(1)

No. 93-5209-CFY
Status: GRANTED

Title: Darren J. Custis, Petitioner
v.
United States

Docketed:
July 15, 1993

Court: United States Court of Appeals for the Fourth Circuit

Counsel for petitioner: French,Mary M.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Jul 15 1993	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Aug 12 1993		Order extending time to file response to petition until September 15, 1993.
5	Sep 15 1993		Brief of respondent United States filed.
6	Sep 23 1993		DISTRIBUTED. October 8, 1993
7	Sep 27 1993	X	Reply brief of petitioner filed.
9	Oct 12 1993		Petition GRANTED. limited to Question 1 presented by the petition.
			**********
11	Nov 1 1993		Record filed.
		*	Partial proceedings United States Court of Appeals for the Fourth Circuit.
12	Nov 2 1993		Record filed.
		*	Original record proceedings United States District Court for the District of Maryland.
10	Nov 3 1993		Joint appendix filed.
13	Nov 26 1993		Brief of petitioner Darren J. Custis filed.
14	Dec 22 1993	G	Motion of Criminal Justice Legal Foundation for leave to file a brief as amicus curiae filed.
15	Dec 29 1993		SET FOR ARGUMENT MONDAY, FEBRUARY 28, 1994.(2ND CASE).
16	Jan 3 1994		Brief of respondent United States filed.
17	Jan 3 1994		Brief amici curiae of Ohio, et al. filed.
19	Jan 7 1994		CIRCULATED.
18	Jan 10 1994		Motion of Criminal Justice Legal Foundation for leave to file a brief as amicus curiae GRANTED.
20	Feb 4 1994	X	Reply brief of petitioner Darren J. Custis filed.
21	Feb 28 1994		ARGUED.

EDITOR'S NOTE

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(2)

ORIGINAL

No. 93-5209

IN THE
SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
JUL 15 1993
OFFICE OF THE CLERK

OCTOBER TERM, 1992

DARREN J. CUSTIS

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a defendant may challenge, in a federal sentencing proceeding, the constitutional validity of prior convictions offered by the government for sentencing enhancement under the Armed Career Criminal Act.

2. Whether attempted breaking and entering is a "violent felony" for purposes of sentencing enhancement under the Armed Career Criminal Act.

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	7
1. A defendant must be permitted to challenge the constitutional validity of prior convictions offered by the government for sentencing enhancement under the Armed Career Criminal Act	7
2. Principles of comity and federalism support review	13
3. The ruling that attempted breaking and entering is a violent felony conflicts with decisions of other federal circuits and stems from a failure to follow a decision of this Court	16
CONCLUSION	19

INDEX TO APPENDICES

Appendix A	Opinion of the Fourth Circuit and Order Denying Rehearing reported in United States v. Custis, 988 F.2d 1355 (4th Cir. 1993)	1a
Appendix B	Opinion of the United States District Court for the District of Maryland published at 786 F. Supp. 533 (D. Md. 1992)	11a
Appendix C	Constitutional and Statutory Provisions Involved	17a

TABLE OF AUTHORITIES

PAGE

CASES:

Boykin v. Alabama, 395 U.S. 238 (1969) 9, 11, 15

Burgett v. Texas, 389 U.S. 109 (1967) . . . . . passim

Gideon v. Wainwright, 372 U.S. 335 (1963) . . 6, 7, 8, 10, 11, 12

Kimmelman v. Morrison, 477 U.S. 365 (1986) 10, 15

Lewis v. United States, 445 U.S. 55 (1980) 13

McKaskle v. Wiggins, 465 U.S. 168 (1984) 11

McMann v. Richardson, 397 U.S. 759 (1970) 10

McMannis v. State, 311 Md. 534, 536 A.2d 652 (1988) 14

Parke v. Raley, 113 S. Ct. 517 (1992) 15

Strickland v. Washington, 466 U.S. 668 (1984) 10

Taylor v. United States, 495 U.S. 575 (1990) 16, 17, 18

Tumey v. Ohio, 273 U.S. 510 (1927) 11

United States v. Brown, 991 F.2d 1162 (3rd Cir. 1993) 9

United States v. Canales, 960 F.2d 1311 (5th Cir. 1992) 9

United States v. Clawson, 831 F.2d 909 (9th Cir. 1987), cert. denied, 488 U.S. 923 (1988) 9

United States v. Day, 949 F.2d 973 (8th Cir. 1991) 9, 16

United States v. Franklin, 972 F.2d 1253 (11th Cir. 1992) . . . 9

United States v. Gallman, 907 F.2d 639 (7th Cir. 1990), cert. denied, 111 S. Ct. 1110 (1991) 9, 16

United States v. Hewitt, 942 F.2d 1270 (8th Cir. 1991) 9

United States v. Jakobetz, 955 F.2d 786 (2d Cir.), cert. denied, 113 S. Ct. 104 (1992) 9

United States v. Lane, 909 F.2d 895 (6th Cir. 1990), cert. denied, 111 S. Ct. 977 (1991) 16

United States v. Martinez, 954 F.2d 1050 (5th Cir. 1992) 16, 18

United States v. O'Brien, 972 F.2d 47 (3d Cir. 1992) 16

United States v. Paleo, 967 F.2d 7 (1st Cir. 1992) . . . passim

United States v. Payne, 966 F.2d 4 (1st Cir. 1992) 16

United States v. Preston, 910 F.2d 81 (3rd Cir. 1990), cert. denied, 498 U.S. 1103 (1991) 9

United States v. Roman, 989 F.2d 1117 (11th Cir. 1993) 9

United States v. Ruo, 943 F.2d 1274 (11th Cir. 1991) 16

United States v. Strahl, 958 F.2d 980 (10th Cir. 1992) . 16, 18

United States v. Taylor, 882 F.2d 1018 (6th Cir. 1989), cert. denied, 496 U.S. 907 (1990) 9

United States v. Tucker, 404 U.S. 443 (1972) . . . . . passim

United States v. Vea-Gonzalez, 986 F.2d 321 (9th Cir. 1993) . . 9

Vasquez v. Hillery, 474 U.S. 254 (1986) 11

Young v. State, 303 Md. 298, 493 A.2d 352 (1985) 17, 18

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS:

Sixth Amendment to the United States Constitution 8

18 U.S.C. section 922(g) 2

18 U.S.C. section 922(g)(1) 2

18 U.S.C. section 924(a)(2) 4

18 U.S.C. section 924(c) 2

18 U.S.C. section 924(e) (Supp. 1993) 4, 5, 12

18 U.S.C. section 924(e)(1) 2

18 U.S.C. section 924(e)(2)(B)(ii) (Supp. 1993) 7, 16

18 U.S.C. section 3231 2

18 U.S.C. section 3661 (1985) 12

21 U.S.C. section 841(a)(1) 2

Armed Career Criminal Act . . . . . passim

Md. Ann. Code Art. 17, section 645A(a)(1992) 15

United States Sentencing Commission, Guidelines Manual, section 4B1.4(a) (Nov. 1990) 5

ORIGINAL

No. 93-5209

IN THE
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OCTOBER TERM, 1992

DARREN J. CUSTIS

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

The Petitioner, Darren J. Custis, respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-10a) is reported at 988 F.2d 1355. The opinion of the district court (App. 11a-16a) is reported at 786 F. Supp. 533 (D. Md. 1992).

JURISDICTION

The judgment of the Fourth Circuit was entered on March 22, 1993. A Petition for Rehearing was filed on April 5, 1993. The Petition for Rehearing was denied on April 30, 1993, with four judges voting to hear the case in banc, infra 10a. This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution are reproduced at App. 17a. The relevant provisions of 18 U.S.C. sections 921, 922, and 924 (Supp. 1993), 18 U.S.C. section 3661 (1985), and Maryland Annotated Code article 27, section 31A (1992) are reproduced at App. 17a-18a.

STATEMENT OF THE CASE

On September 11, 1991, Petitioner Darren J. Custis was indicted in the United States District Court for the District of Maryland for possession of cocaine with intent to distribute, in violation of 21 U.S.C. section 841(a)(1)(Count one); use of a firearm in connection with a drug trafficking offense, in violation of 18 U.S.C. section 924(c)(Count two); and possession of a firearm by a convicted felon, in violation of 18 U.S.C. section 922(g)(1)(Count three). A jury found Mr. Custis not guilty of possession with intent to distribute (Count one) and use of a firearm during a drug offense (Count two), but guilty of possession of a firearm by a convicted felon (Count three) and simple possession of cocaine, a misdemeanor and lesser included offense of count one. The district court had jurisdiction under 18 U.S.C. section 3231.

At sentencing, the government sought application of 18 U.S.C. section 924(e)(1), which mandates a prison sentence of at least fifteen years without parole if a defendant convicted under 18 U.S.C. section 922(g) "has three previous convictions . . . for a violent felony or a serious drug offense . . . ." The government

offered three prior convictions rendered by state courts in Pennsylvania and Maryland as predicates for imposition of the mandatory minimum sentence: (1) a 1985 conviction in Pennsylvania state court for robbery; (2) a 1985 conviction in Maryland state court for burglary; and (3) a 1989 conviction in Maryland state court for attempted breaking and entering. Mr. Custis asserted that the statutory minimum penalty did not apply, because both Maryland convictions relied on by the government were constitutionally invalid.

Mr. Custis asserted that his 1985 guilty plea to burglary was not knowingly and voluntarily made and resulted from a denial of effective assistance of counsel. The plea was not knowing or voluntary because Mr. Custis's attorney failed to provide him with information about possible defenses, and Mr. Custis pleaded guilty out of his resulting ignorance. Mr. Custis submitted the transcript of the guilty plea, which showed that he could have asserted a defense, that his lawyer did not advise him of any possible defenses, and that he was "confus[ed]" during the guilty plea proceeding.[1] Mr. Custis asserted that if he had known of his

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[1] The transcript records the following colloquy:

THE COURT: Has [your lawyer] given you certain advice as to whether or not to plead guilty, whether or not to accept the agreement? Has she given you that advice?

THE DEFENDANT: Somewhat.

THE COURT: Has she told you in the past the possible defense you might have in this case?

THE DEFENDANT: No.

possible defenses in the earlier case, he would have exercised his right to stand trial.

Mr. Custis also challenged on two grounds the 1989 conviction for attempted breaking and entering. That conviction was entered upon a "stipulated facts trial." Mr. Custis submitted a five page transcript of that proceeding. Mr. Custis argued that a stipulated facts trial is the equivalent of a guilty plea, that the transcript did not establish a knowing and voluntary plea, and that the proceeding was fundamentally unfair. In addition, Mr. Custis contended that the 1989 conviction could not in any event be used to enhance his sentence because attempted breaking and entering is not a "violent felony" within the meaning of 18 U.S.C. section 924(e)(Supp. 1993).

If either of the two convictions Custis challenged was not used for enhancement under 18 U.S.C. section 924(e), the guideline sentencing range would have been 33 to 41 months, and the statutory maximum under 18 U.S.C. section 924(a)(2) would have been ten years. Counting all three convictions, the statutory minimum

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THE COURT: She has not told you what defenses you might have had or that you didn't have any?

THE DEFENDANT: No.

THE COURT: Has she discussed the case with you?

THE DEFENDANT: Yes, somewhat, but it's been confusing.

THE COURT: What's been confusing?

THE DEFENDANT: The whole thing really has been confusing.

Record, Paper No. 42, Exhibit 1, pp. 19-20.

sentence was fifteen years, and the armed career criminal sentencing guideline prescribed a sentencing range of 235 to 293 months.[2]

The district court refused to consider Custis's constitutional challenges, ruling that a challenge to prior convictions would not be allowed unless the defendant had no legal representation at all. App. 13a-15a. Accordingly, the court refused to take evidence or to make findings on the validity of the prior convictions. The court also rejected Custis's argument that the prior conviction for attempted breaking and entering is not a violent felony. Counting all three prior convictions as violent felonies, the court imposed a sentence of 235 months on count three (the minimum sentence prescribed by the guidelines for defendants to whom the ACCA applies), and a concurrent sentence of 12 months on the misdemeanor drug offense.

The court of appeals affirmed in part, reversed in part, and remanded.[3] The court allowed that the Constitution forbids imposition of a mandatory minimum sentence based on a prior conviction that resulted from a complete denial of counsel. App.

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[2] The federal sentencing guideline for armed career criminals, guideline § 4B1.4, applies only to "[a] defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. section 924(e)." United States Sentencing Commission, Guidelines Manual, § 4B1.4(a)(Nov. 1990). Thus, the counting of Custis's invalid convictions under the statute was dispositive of his guideline sentencing range.

[3] Apart from the sentencing rulings discussed above, the district court ordered a new trial on grounds that two key prosecution witnesses had been indicted for perjury. App. 16a. The Fourth Circuit reversed the grant of a new trial. App. 5a-6a.

6a-7a. It believed, however, that violations of Gideon v. Wainwright, 372 U.S. 335 (1963) are "different in kind" from the claims of ineffective assistance of counsel and unknowing pleas of guilt that Custis asserted. App. 6a. The court opined that permitting such claims "would place a substantial burden" on prosecutors and district judges, and that such claims would delay and complicate the sentencing process. App. 7a. In addition, the court stated that permitting federal defendants to assert constitutional challenges to prior convictions during sentencing would impair the values of comity and federalism. App. 7a. Acknowledging that such challenges would not directly affect the state convictions, the court opined that a state court conviction "commands respect, in whatever forum and for whatever purposes it has come under challenge." App. 7a.

The court therefore announced that "district courts are obliged to hear constitutional challenges to predicate state convictions in federal sentencing proceedings only when prejudice can be presumed from the alleged constitutional violation, regardless of the facts of the particular case; and when the right asserted is so fundamental that its violation would undercut confidence in the guilt of the defendant." App. 8a. The court held that a district court need not consider whether prior convictions were obtained in violation of the right to effective assistance of counsel or whether they were obtained through an unknowing and involuntary guilty plea, because establishing either type of claim entails a "fact-intensive inquiry." App. 8a-9a. The

court noted that if Mr. Custis successfully pursued his claims in state and federal courts through post-conviction and habeas proceedings, he might then seek revision of his federal sentence. App. 9a.

In addition, the court of appeals rejected Mr. Custis's argument that attempted breaking and entering is not a "violent felony" under 18 U.S.C. section 924(e)(2)(B)(ii)(Supp. 1993). App. 9a-10a. In so ruling, the court did not examine the statutory elements of attempted breaking and entering, but instead relied on its belief that "[i]n most cases, attempted breaking and entering will be charged when a defendant has been interrupted in the course of illegally entering a home." App. 10a (emphasis supplied). Based on that belief, the court decided that attempted breaking and entering "presents a serious potential risk of physical injury to another" and therefore constitutes a violent felony. Id.

REASONS FOR GRANTING THE PETITION

1. A Defendant must be permitted to challenge the constitutional validity of prior convictions offered by the government for sentencing enhancement under the Armed Career Criminal Act

This Court has held that use of constitutionally invalid prior convictions to enhance a sentence violates the Constitution. In Burgett v. Texas, 389 U.S. 109, 115 (1967), the Court held that a conviction obtained in violation of Gideon v. Wainwright[4] may not "be used against a person either to support guilt or enhance punishment for another offense." The Court reasoned that allowing

[4] 372 U.S. 335 (1963).

such use of the prior conviction would not only erode the principle of Gideon, but also force "the accused in effect [to] suffer anew from the deprivation of that Sixth Amendment right." Id. In United States v. Tucker, 404 U.S. 443 (1972), the Court held that a defendant was entitled to resentencing because the federal district court had based his sentence for bank robbery on three prior state convictions resulting from proceedings in which he had not been represented by counsel. The Court explained that the question was not whether the outcomes of the state proceedings might have been different if Tucker had had counsel. 404 U.S. at 447-48. Rather, the question was whether the federal sentencing judge might have imposed a different sentence if the sentencing judge had known about the unconstitutionality of the prior convictions. Adopting the reasoning of Burgett, the Court explained that erosion of Gideon could be prevented only by ordering resentencing. Tucker, 404 U.S. at 449.

Seven federal circuits have recognized that a defendant may challenge, in a federal sentencing proceeding, the constitutional validity of prior state convictions offered by the government for sentencing enhancement under the Armed Career Criminal Act. The First, Third, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits have recognized that constitutional violations other than Gideon violations -- including the very violations Custis asserted below -- are equally improper for a sentencing court to overlook when prior convictions are offered for sentencing enhancement under the ACCA. United States v. Paleo, 967 F.2d 7, 11 (1st Cir.

1992)(permitting challenge on grounds that two convictions were obtained in violation of Boykin v. Alabama, 395 U.S. 238 (1969), and one involved a constitutionally inadequate resentencing) United States v. Preston, 910 F.2d 81, 87-89 (3rd Cir. 1990), cert. denied, 498 U.S. 1103 (1991)(conflict of interest by defense counsel); United States v. Taylor, 882 F.2d 1018, 1031 (6th Cir. 1989), cert. denied, 496 U.S. 907 (1990)(guilty plea not knowing and voluntary); United States v. Gallman, 907 F.2d 639, 642-45 (7th Cir. 1990), cert. denied, 111 S. Ct. 1110 (1991)(guilty plea not knowing and voluntary); United States v. Day, 949 F.2d 973, 981-84 (8th Cir. 1991)(failure to hold competency hearing); United States v. Clawson, 831 F.2d 909, 914-15 (9th Cir. 1987), cert. denied, 488 U.S. 923 (1988)(ineffective assistance of counsel); United States v. Franklin, 972 F.2d 1253, 1257-58 (11th Cir. 1992)(guilty plea not knowing and voluntary).[5]

The Fourth Circuit's opinion improperly limits this Court's decisions in Burgett and Tucker to claims that a defendant was

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[5] The federal circuits are also divided on the related question of whether to allow constitutional challenges to prior convictions when offered for enhancement under the federal sentencing guidelines. Some circuits require or permit district courts to examine the constitutional validity of prior convictions used under the federal sentencing guidelines. E.g., United States v. Brown, 991 F.2d 1162, 1165-66 (3rd Cir. 1993); United States v. Vea-Gonzalez, 986 F.2d 321, 327-29 (9th Cir. 1993); United States v. Canales, 960 F.2d 1311, 1315 (5th Cir. 1992); United States v. Jakobetz, 955 F.2d 786, 805 (2d Cir.), cert. denied 113 S. Ct. 104 (1992). Other circuits have limited such inquiries, United States v. Roman, 989 F.2d 1117, 1120 (11th Cir. 1993)(district courts cannot examine constitutional validity of prior convictions unless defendant shows conviction presumptively void), or refused to permit them. United States v. Hewitt, 942 F.2d 1270, 1276 (8th Cir. 1991).

completely deprived of counsel. In permitting defendants who were without counsel to challenge the constitutionality of a prior conviction, while denying defendants who suffered ineffective assistance of counsel and other constitutional violations the same opportunity, the Fourth Circuit has created an arbitrary scheme for determining what defendants will be subject to the mandatory minimum fifteen year sentence under the ACCA. Contrary to this Court's teachings in Burgett and Tucker, this scheme erodes constitutional principles and forces defendants to "suffer anew" from the deprivation of their constitutional rights.

As the court below was compelled to acknowledge, the right to counsel is a fundamental right of criminal defendants, Gideon v. Wainwright, 372 U.S. 335, 344 (1963), and "assures the fairness, and thus the legitimacy, of our adversary process." Kimmelman v. Morrison, 477 U.S. 365, 374 (1986). But in distinguishing Custis's claim of ineffective assistance of counsel, the court failed to recognize that the right to counsel is the right to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970). "That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command." Strickland v. Washington, 466 U.S. 668, 685 (1984). Moreover, the mere presence of an ineffective lawyer does little to diminish the unreliability of resulting convictions, the concern underlying this Court's decision in Gideon. Thus, imposition of a mandatory minimum sentence based on a conviction obtained in violation of the right to effective

assistance of counsel erodes the principle of Gideon and forces the defendant to "suffer anew" from the earlier constitutional violation. The reasoning of Burgett and Tucker is therefore fully applicable here.

Likewise, the acceptance of a plea of guilt which is not knowing and voluntary deprives the defendant of the most fundamental federal rights that the Bill of Rights guarantees persons accused of a crime, including the privilege against self-incrimination, right to trial by jury, and right to confront adverse witnesses. Boykin v. Alabama, 395 U.S. 238 (1969). Absent a knowing and voluntary waiver, a conviction resulting from the deprivation of these fundamental constitutional rights is wholly unreliable.

The Fourth Circuit held that neither of these claims merited consideration, however, because each entailed a "fact-intensive inquiry." App. 8a-9a. Because the demonstration of any constitutional violation requires some degree of factual showing, it appears that virtually all challenges could be barred under the Fourth Circuit's test. The Fourth Circuit's standard might bar from consideration even those constitutional errors which this Court has identified as "structural" in nature.[6]

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[6] See, e.g., Vasquez v. Hillery, 474 U.S. 254, 264 (1986)(racial discrimination in grand jury selection); McKaskle v. Wiggins 465 U.S. 168, 177 n.8 (1984)(violation of the right to self representation); Tumey v. Ohio, 273 U.S. 510, 535 (1927)(trial by biased judge). Each of these claims could require a more intensive examination of facts outside the record than the claims Custis attempted to assert here.

Nothing in the ACCA required the restriction imposed by the Fourth Circuit on a sentencing court's consideration of the validity of prior convictions. As the First Circuit has explained, the language of the statute does not dictate that the term "convictions" be construed as including unconstitutional as well as constitutional convictions. United States v. Paleo, 967 F.2d 7, 14 (1st Cir. 1992)(Breyer, C.J.)(interpreting "convictions" in section 924(e) to include "constitutionally valid" convictions, not unconstitutional convictions). Enacting the penalty enhancement provision in 1984 against the backdrop of this Court's rulings in Burgett and Tucker, Congress may well have thought the alternative phrase "valid convictions" a redundancy. Indeed, even the court below recognized that the term "conviction" must exclude some invalid convictions, for it expressly allowed for challenges based on Gideon. Its allowance of some challenges apparently recognizes that an interpretation treating all convictions as qualifying for sentencing enhancement would offend due process and therefore is not plausible.

In addition, the Fourth Circuit's ruling conflicts with 18 U.S.C. section 3661 (1985), which provides that the sentencing court's power to consider relevant information is unlimited:

> No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

Information concerning the validity of a defendant's prior convictions bears directly on their reliability as evidence of

recidivism and therefore is critical to fully informed sentencing.[7] By foreclosing consideration of such information and punishing the defendant more severely on account of convictions that are themselves fruits of earlier constitutional violations, the Fourth Circuit's ruling cannot be squared either with the sentencing scheme Congress adopted or with rudimentary concerns of due process.

2. Principles of comity and federalism support review

The decision below appears to be driven chiefly by values of comity and federalism. App. at 10-11. To preserve these values, the court of appeals attempted to impose an exhaustion requirement, suggesting that if Mr. Custis pursued relief in state and federal post-conviction proceedings, then, perhaps, he might seek resentencing in this case. The Fourth Circuit stands alone among the circuits in requiring exhaustion of state remedies before permitting consideration of the unconstitutionality of prior convictions offered to enhance a sentence under the ACCA.

The Fourth Circuit's comity concerns are misguided for three reasons. First, Maryland has expressly invited other jurisdictions

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[7] In Lewis v. United States, 445 U.S. 55 (1980), the Court ruled that a conviction not previously ruled invalid may be used as a basis for a statutory prohibition against possession of firearms. Unlike this case, Lewis involved the statutory elements of an offense, not a sentencing enhancement scheme, so that Burgett and Tucker were not implicated. The Lewis opinion reflects the need for prospective knowledge of whether possession of firearms is permitted. The only question in this case is how severely a person convicted of a crime is to be punished on account of prior convictions. Therefore, no similar consideration precludes judicial review of convictions prior to their use for sentencing enhancement.

to examine the validity of convictions obtained in its courts before using them for sentencing enhancement. In McMannis v. State, 311 Md. 534, 536 A.2d 652 (1988), the Maryland Court of Appeals refused to consider a post-conviction petition brought by a defendant who had been sentenced as a recidivist in another jurisdiction, because his Maryland sentence had expired and he was no longer in custody. The court held that "[w]hen a challenge to the validity of a foreign predicate conviction is lodged, we believe it is the jurisdiction utilizing that foreign conviction for enhancement of sentence which should bear the responsibility of resolving that controversy." 311 Md. at 544, 536 A.2d at 657. In view of this invitation, the comity concerns on which the Fourth Circuit relied do not exist. Simply put, state courts do not wish to be burdened with constitutional challenges filed by federal defendants. While recognizing that consideration of such claims by sentencing courts is appropriate, the state has no interest in the length of a federal defendant's sentence. The Fourth Circuit's opinion undermines comity considerations by burdening busy state courts with litigation on federal questions in which the state has no interest.

Second, the exercise of federal judicial power in federal sentencing hearings does not involve assertion of federal jurisdiction over a state criminal case. United States v. Paleo, 967 F.2d 7, 12 (1st Cir. 1992). Considerations of comity are not compelling when a federal court's examination of the state conviction does not free a state prisoner or otherwise interfere

with the state's authority. Mr. Custis merely informed a federal court that the exercise of federal punitive power should not be based on judgments resulting from an earlier constitutional violation. There are no costs to the state from a review of state court convictions in this limited fashion. Cf. Kimmelman v. Morrison, 477 U.S. 365, 379 (1986).

Third, contrary to the Fourth Circuit's assumption, there is no state forum for Mr. Custis's constitutional challenges. A post-conviction petition may be filed in Maryland only if the petitioner is incarcerated or under parole or probation supervision in connection with the conviction at issue. See Md. Ann. Code art. 17, section 645A(a)(1992). As will usually be the case, Mr. Custis completed his state term of incarceration before being charged under the ACCA. The Fourth Circuit's opinion leaves a large class of defendants, like Mr. Custis, with no means of preventing the imposition of a mandatory minimum sentence based on an earlier constitutional violation. For these reasons, the comity concerns underlying the Fourth Circuit's opinion are illusory.[1]

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[1] The Fourth Circuit's opinion also reflects concern about burdens on prosecutors and district judges from permitting constitutional challenges to prior convictions. But as the First Circuit observed in Paleo, a rule requiring federal courts to assume that past convictions are valid "would likely increase delay, as defendants are sent from one court to another to press their various challenges." 967 F.2d at 13. The seven circuits that permit such challenges apparently have not experienced the problems that concerned the court below. To the extent that such problems exist, they can be substantially alleviated through burden-shifting rules of proof and procedural rules that guide the consideration of constitutional challenges. See Parke v. Raley, 113 S. Ct. 517, 525-26 (1992)(not fundamentally unfair to require a defendant to produce evidence of noncompliance with Boykin when no transcript exists). See also United States v. Paleo, 967 F.2d

3. The ruling that attempted breaking and entering is a violent felony conflicts with decisions of other federal circuits and stems from a failure to follow a decision of this Court

The Fourth Circuit's ruling that attempted breaking and entering is a "violent felony" under the ACCA adds to a split in the circuits on whether attempt crimes are crimes of violence for purposes of the ACCA. Contrary to the decision below, the Fifth and Tenth Circuits have held that attempted burglary is not a violent felony under the ACCA. United States v. Martinez, 954 F.2d 1050, 1053-54 (5th Cir. 1992); United States v. Strahl, 958 F.2d 980, 985-86 (10th Cir. 1992). Three other circuits have reached the opposite conclusion. United States v. Lane, 909 F.2d 895, 902-03 (6th Cir. 1990), cert. denied, 111 S. Ct. 977 (1991); United States v. O'Brien, 972 F.2d 47, 52 (3d Cir. 1992); United States v. Payne, 966 F.2d 4, 8-9 (1st Cir. 1992).

The statute defines the term "violent felony" as one that "involves conduct that presents a serious potential risk of physical injury to another" under 18 U.S.C. 924(e)(2)(B)(ii). In Taylor v. United States, 495 U.S. 575, 602 (1990), this Court interpreted that definition as requiring the sentencing court "to look only to the fact of conviction and the statutory definition of

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7, 13 (1st Cir. 1992)(defendant bears burden of proving the invalidity of a prior conviction); United States v. Day, 949 F.2d 973, 982-83 (8th Cir. 1991)(same); United States v. Ruo, 943 F.2d 1274, 1276 (11th Cir. 1991)(same) United States v. Gallman, 907 F.2d 639, 643-645 (7th Cir. 1990), cert. denied, 111 S. Ct. 1110 (1991)(same).

the prior offense," not to the particular facts underlying the conviction. Taylor, 495 U.S. at 602. This categorical approach ensures uniformity and avoids a sentencing scheme in which "a particular crime might sometimes count towards enhancement and sometimes not, depending on the facts of the case." Id. at 601.

The Fourth Circuit did not apply the categorical approach that Taylor requires. Instead of examining the statutory elements of attempted breaking and entering, the court focused on the fact that the offense of completed breaking and entering involves entry into "the dwelling house of another" and on its belief that "[i]n most cases, attempted breaking and entering will be charged when a defendant has been interrupted in the course of illegally entering a home." App. 10a (emphasis supplied).

Application of the Taylor analysis demonstrates that as defined by Maryland law, attempts are not violent felonies. In Maryland, the offense of criminal attempt is a common law misdemeanor. Young v. State, 303 Md. 298, 301, 493 A.2d 352, 353 (1985). Maryland has adopted the Model Penal Code's "substantial step" test for attempts. Under that test, the state need only prove: (1) a substantial step toward commission of the crime, and (2) intent to commit the crime. Young, 303 Md. at 311, 493 A.2d at 359. Because any "substantial step" suffices, no unlawful entry is required. The defendant need do no more than possess materials intended to be employed in the commission of the crime, such as a floor plan or a key, even if they are not possessed at or near the place contemplated for commission of the crime. Likewise, merely

scouting out an area with intent to return later also suffices under the substantial step test. 303 Md. at 312, 493 A.2d at 359. In fact, Maryland adopted the substantial step test precisely because it enables the police to intervene at such early stages. 303 Md. at 314, 493 A.2d at 360.

Because attempted breaking and entering need not involve entry into a dwelling, a substantial risk of confrontation is not inherent in the crime. Indeed, the offense can take place long before the offender encounters any other person, and without the offender being in the vicinity of the building. Therefore, under the categorical approach this Court adopted in Taylor, attempted breaking and entering does not, by its very nature, pose a serious potential risk of physical injury to another, and does not constitute a violent felony under the ACCA. United States v. Martinez, 954 F.2d 1050 (5th Cir. 1992); United States v. Strahl, 958 F.2d 980 (10th Cir. 1992).

Approximately half of the states and a majority of the federal circuits have adopted the substantial step test in some form by legislation or judicial action. Young v. State, 303 Md. at 314, 493 A.2d at 361 (1985)(compiling cases and statutes). The issue presented thus has substantial importance far beyond the borders of Maryland and the Fourth Circuit. Certiorari should be granted to establish uniformity on this issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 14, 1993

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellant,

v.

Darren J. CUSTIS, Defendant-Appellee.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Darren J. CUSTIS, Defendant-Appellant.

Nos. 92-5211, 92-5212.

United States Court of Appeals,
Fourth Circuit.

Argued Dec. 4, 1992.

Decided March 22, 1993.

As Amended April 6, 1993.

Order Denying Rehearing and Rehearing En Banc April 30, 1993.

After defendant's conviction for possession of firearm and possession of cocaine, the United States District Court for the District of Maryland, Frederic Nelson Smalkin, J., 786 F.Supp. 533, granted new trial, and government appealed. Defendant cross-appealed sentence enhancement. The Court of Appeals, Wilkinson, Circuit Judge, held that: (1) subsequent indictment of police officer witnesses for perjury did not entitle defendant to new trial; (2) trial court could refuse to entertain constitutional challenges to predicate state convictions for sentencing as armed career criminal; and (3) attempted breaking and entering was "violent felony" for sentence enhancement purposes.

Affirmed in part, reversed in part, and remanded with instructions.

1. **Criminal Law ⇐942(1)**

While new evidence going only to credibility of witness does not generally warrant granting of new trial, there may exceptional rare case that would justify new trial solely on basis of newly discovered impeachment evidence.

2. **Criminal Law ⇐942(1)**

Subsequent indictment of two police officer witnesses for perjury did not warrant new trial; indictment involved unrelated case with issues that had no bearing on defendant's trial, charges against officers were mere allegations, indictments were dismissed, and officers' account of events leading to defendant's arrest was corroborated by testimony of third officer and, to some extent, testimony of defendant himself.

3. **Criminal Law ⇐1202.10(2), (4)**

Fact that district court acts scrupulously in determining that defendant's right to counsel was observed in proceedings leading to predicate state convictions for sentencing as armed career criminal does not oblige it to take evidence on defendant's other constitutional challenges to those convictions, as complete deprivation of counsel is different in kind from other constitutional errors; when defendant is deprived of counsel, he has lost ability to assert all other constitutional rights, and requiring district courts to entertain other fact-intensive constitutional claims would present practical difficulties and impair values of comity and federalism. 18 U.S.C.A. § 924(e)(1); U.S.C.A. Const.Amend. 6.

4. **Criminal Law ⇐1202.10(4)**

District courts are obliged to hear constitutional challenges to predicate state convictions in federal sentencing proceedings only when prejudice can be presumed from alleged constitutional violation, regardless of facts of particular case, and when right asserted is so fundamental that its violation would undercut confidence in guilt of accused.

5. **Criminal Law ⇐641.13(1)**

In order to make out claim of ineffective assistance of counsel, defendant must show that counsel's errors prejudiced his defense. U.S.C.A. Const.Amend. 6.

6. **Criminal Law ⇐1202.10(4)**

District court could refuse to entertain defendant's claim that predicate state conviction for sentencing as armed career criminal was obtained in violation of his right to effective assistance of counsel; counsel's errors do not carry presumption of prejudice, but, rather, defendant must show that alleged errors prejudiced defense, and finding of prejudice entails fact-intensive inquiry, requiring extensive reference to record in state proceeding. 18 U.S.C.A. § 924(e)(1); U.S.C.A. Const. Amend. 6.

7. **Criminal Law ⇐1202.10(4)**

While prejudice to defendant can be presumed on direct appeal when record does not affirmatively demonstrate that defendant's plea of guilt was knowing, that presumption does not carry over when defendant attacks intelligence of his plea collaterally.

8. **Criminal Law ⇐997.15(2)**

When defendant is represented by counsel when making his guilty plea, that plea is presumed valid when later attacked in habeas corpus proceeding. 28 U.S.C.A § 2255.

9. **Criminal Law ⇐997.15(2)**

To overcome, in habeas corpus proceedings, strong presumption of validity of counseled guilty plea, defendant must make factual showing that his plea was not voluntary and intelligent. 28 U.S.C.A. § 2255.

10. **Criminal Law ⇐1202.10(4)**

District court could refuse to entertain defendant's claim that state predicate convictions for sentencing as armed career criminal were obtained without knowing plea of guilt; defendant was required to make factual showing that his plea was not voluntary and intelligent to overcome presumption of validity of counseled guilty plea and appropriate forum for such fact-intensive showing was in state collateral proceeding or federal habeas corpus proceedings, not at sentencing hearing for separate offense far removed from original conviction. 18 U.S.C.A. § 924(e)(1).

11. **Criminal Law ⇐1202.10(4)**

If defendant is successful in making state or federal collateral attack on state

sentence, he may seek to revise any federal sentence in which state conviction was factor.

12. Criminal Law ⇐1202.3(1)

In determining whether prior conviction is violent felony for purposes of sentencing as armed career criminal under categorical approach, looking only to statutory definition of offense, courts must make commonsense judgments about whether given offense proscribes generic conduct with potential for serious physical injury to another. 18 U.S.C.A. § 924(e), (e)(2)(B)(ii).

13. Criminal Law ⇐1202.3(1)

Attempted breaking and entering is "violent felony" for purposes of sentencing as armed career criminal; in most cases, attempted breaking and entering will be charged when defendant has been interrupted in course of illegally entering home and interrupting intruder involves risk of confrontation nearly as great as finding him inside home. 18 U.S.C.A. § 924(e), (e)(2)(B)(ii).

See publication Words and Phrases for other judicial constructions and definitions.

Thomas Michael DeBiagio, Asst. U.S. Atty., Baltimore, MD (Richard D. Bennett, U.S. Atty., Robert E. Sims, Asst. U.S. Atty., on brief), for appellant.

Mary Melissa French, Asst. Federal Public Defender, Baltimore, MD (Anthony R. Gallagher, Acting Federal Public Defender, on brief), for appellee.

Before RUSSELL and WILKINSON, Circuit Judges, and MERHIGE, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

OPINION

WILKINSON, Circuit Judge:

In this case, Darren Custis claims (1) that he is entitled to a new trial on the basis of newly discovered impeaching evidence; (2) that he is entitled to have the constitutionality of several predicate state convictions considered in his federal sentencing proceeding; and (3) that his prior conviction for attempted breaking and entering should not have been defined as a violent felony for purposes of the sentencing enhancement under 18 U.S.C. § 924(e). For the reasons that follow, we reverse the district court's granting of a new trial and remand this case with instructions to reinstate the judgment of conviction. We find no error, however, in that court's treatment of the defendant's predicate state convictions, nor in its determination that defendant was eligible for sentence enhancement as an armed career criminal. We thus affirm the sentence imposed upon defendant.

I.

Darren Custis was arrested on July 1, 1991 by Baltimore City Police Officers Christopher Wade and John Mohr. Pursuant to "Operation Triggerlock," a federal effort to crack down on the use of firearms by convicted felons, Custis was indicted by a federal grand jury on three counts: (1) possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1); (2) use of a firearm in connection with a drug trafficking offense in violation of 18 U.S.C. § 924(c); and (3) possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). The government gave notice that it would seek an enhanced penalty for the section 922(g)(1) offense under 18 U.S.C. § 924(e)(1), which provides for a minimum fifteen-year sentence for defendants who have three prior convictions for a violent felony or a serious drug offense. The notice listed state convictions for burglary, attempted burglary, and robbery as predicate offenses for the sentence enhancement.

At trial, three Baltimore City Police Officers testified on behalf of the government: the arresting officers, Christopher Wade and John Mohr, and an officer who interviewed Custis the morning after his arrest, Louis Hopson. Wade testified that at around 5:00 P.M. on July 1, he and Mohr approached the intersection of Springhill Avenue and Towanda, an area known to be the site of extensive drug dealing. Four or five individuals were standing on the corner in front of a convenience store, the Springhill Market. As the officers approached, one of the individuals called out "5-0," a warning that police officers were nearby. Custis went into the Springhill Market, and the officers followed.

Wade testified that he heard a "loud thump" just before he entered the store. As he entered, Custis was coming up from a crouched position between two video machines. Wade ordered Custis to stop and told Mohr, who was entering behind him, to hold Custis. Wade then investigated the area where Custis had been standing and found a .38 caliber Smith & Wesson revolver. The officers then arrested Custis. As he was being arrested, Custis dropped a small bag of cocaine and said "OK, you got it." Wade then looked around the video machines, where he found eighteen additional bags of cocaine. Custis asked Wade for what he was being arrested, and Wade told him that he was being arrested for possessing cocaine and a handgun. According to Wade, Custis responded, "I will take the cocaine charges but I'm not taking the gun charge." Officer Mohr largely corroborated Wade's testimony.

Officer Hopson testified that he interviewed Custis the morning after his arrest. According to Hopson, Custis initially denied that the gun and drugs were his, but he later admitted that the gun was his and that he worked as an "enforcer" for a drug dealer named "Easy." Hopson did not take a written statement from Custis.

Custis testified on his own behalf. He admitted purchasing the one bag of cocaine in his possession when he was arrested, but denied possessing the gun or the remaining eighteen bags of cocaine. Custis claimed that he had dropped the one bag of cocaine and was picking it up when Wade stopped him. Custis acknowledged that he told Wade he would take the drug charge but not the gun charge. Custis claimed, however, that he meant only the one bag of cocaine that he dropped while being arrested. Custis also denied telling Hopson that the gun was his or that he worked as an "enforcer."

The jury found Custis not guilty of possession with intent to distribute and not guilty of use of a firearm during a drug offense, but found him guilty of possession of a firearm and simple possession of cocaine, a lesser included offense of the charge of possession with intent to distribute cocaine.

After trial, but before sentencing, Officers Wade and Mohr were indicted in state court for perjury in securing a search warrant in an unrelated case. That indictment alleged that the officers had falsely stated that a substance suspected to be cocaine had been submitted to the Evidence Control Section of the Baltimore City Police Department for chemical analysis. The evidence had not been submitted until after the warrants had been obtained and executed. Based on this indictment, Custis moved for a new trial. The district court deferred ruling on this motion until the sentencing hearing.

At the sentencing hearing, the government moved to have Custis's sentence enhanced under the Armed Career Criminal Act, 18 U.S.C. § 924(e), based on the prior convictions included in the notice of sentence enhancement. In response, Custis claimed that two of his prior convictions had been unconstitutionally obtained. He argued that his counsel for his 1985 burglary conviction was unconstitutionally ineffective and that his guilty plea was not knowing and intelligent. Custis also alleged that the 1989 conviction violated due process because he was not adequately advised of his rights before entering a plea. Custis further claimed that the 1989 conviction was for attempted breaking and entering rather than attempted burglary and thus was not a violent felony. The district court declined to hear Custis's arguments that two of his prior convictions had been unconstitutionally obtained, and found that all three convictions were for violent felonies, thus making him eligible for the sentence enhancement under section 924(e)(1). *United States v. Custis*, 786 F.Supp. 533, 537 (D.Md.1992).

After determining Custis's sentence, the district court heard his motion for a new trial based on newly discovered evidence. Fed.R.Crim.P. 33. The motion was based on the perjury indictments of Wade and Mohr. Finding that the indictments sufficiently undercut the credibility of those officers so as to justify a new trial, the district court granted Custis's motion. 786 F.Supp. at 538.

Subsequent to the district court's grant of the new trial, however, the state entered

a *nolle prosequi* (equivalent to a dismissal without prejudice) in the Circuit Court of Baltimore City dismissing all charges against Wade and Mohr. The government then filed a motion with the district court to reconsider its grant of a new trial, but because the government had already appealed that motion to this court, the district court concluded that it lacked jurisdiction over the government's motion.

We have before us now the government's appeal of the district court's grant of a new trial and Custis's cross-appeal of his sentence enhancement under section 924(e). We address these questions in turn.

II.

[1] The district court granted Custis's motion for a new trial on the basis of the indictments of Mohr and Wade for perjury in an unrelated case. The standard for granting a new trial is well established in this circuit:

> (a) the evidence must be, in fact, newly discovered, i.e., discovered since the trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) the evidence relied on must not be merely cumulative or impeaching; (d) it must be material to the issues involved; and (e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal.

United States v. Bales, 813 F.2d 1289, 1295 (4th Cir.1987) (quoting *Mills v. United States*, 281 F.2d 736, 738 (4th Cir.1960) (citations omitted)). On its face, the evidence offered by Custis fails to meet this standard—it is "merely impeaching." This circuit has emphasized that new evidence going only to the credibility of a witness does not generally warrant the granting of a new trial. *United States v. Stockton*, 788 F.2d 210, 220 (4th Cir.1986) (citing *United States v. Williams*, 415 F.2d 232, 233–34 (4th Cir.1969)).

While we have found no exception in this circuit to the general rule that a motion for a new trial requires a defendant to establish *each* of the five elements, *see United States v. Chavis*, 880 F.2d 788, 793 (4th Cir.1989), we need not rule that there can never be such an exception. There may be an exceptional "rare case" that would justify granting a new trial solely on the basis of newly discovered impeachment evidence. *See United States v. Taglia*, 922 F.2d 413, 415–16 (7th Cir.1991) (noting possible exception, but finding requirements for exception not satisfied). The exceptional circumstances identified by the Seventh Circuit in *Taglia* were, however, quite narrow: "If the government's case rested entirely on the uncorroborated testimony of a single witness who was discovered after trial to be utterly unworthy of being believed because he had lied consistently in a string of previous cases, the district judge would have the power to grant a new trial in order to prevent an innocent person from being convicted." *Id.* at 415. This case does not fall into that narrow category.

[2] The state proceeding against Mohr and Wade involved an unrelated case, with issues that had no bearing on those at Custis's trial. Although perjured testimony is a matter of serious concern—and is especially repugnant when committed by an officer of the state—we are not prepared simply to presume these officers guilty of criminal misconduct. The district court made no factual findings concerning the conduct specified in the indictments and admitted that it lacked "detailed knowledge of either the factual basis of the indictments or whether the charges are well-grounded in fact." 786 F.Supp. at 538 n. 4. The charges against the officers thus remain mere allegations, inadmissible under Fed.R.Evid. 609, *see United States v. Dennis*, 625 F.2d 782, 798 (8th Cir.1980), although defendant contends the underlying circumstances might prove to be admissible during cross-examination under Fed. R.Evid. 608(b). *See United States v. Leake*, 642 F.2d 715, 718–19 (4th Cir.1981).[1] In addition, all of the charges against the officers were dismissed after this appeal was taken, a factor which came too late for the district court to consider because it lacked jurisdiction. We are thus confronted on appeal with charges that are both unproven and unconnected to this case. It would not be appropriate to set aside the jury's verdict on such a basis.

1. The admissibility of this evidence seems problematic. There has never been any allegation in the unrelated case that the officers tampered with the evidence, failed to submit that evidence to the Evidence Control Section, or falsely represented the results of chemical analysis. Rather, the officers were charged with securing the search warrant before submitting the evidence for analysis. If the defendant raised this conduct on cross-examination, the government argues that it would be entitled to show in turn that the misstatements were inadvertent or immaterial, and to offer evidence of the officers' character. Custis's new trial might thus be sidetracked by a mini-trial on the allegations in the officers' indictment. Admissibility under Rule 608(b) is subject to the balancing test of Rule 403, *see* Fed.R.Evid. 608 advisory committee's note, which requires that the probative value of the evidence not be substantially outweighed by the prospect of confusion or delay.

The Second Circuit has emphasized that motions for a new trial based on impeaching evidence discovered after trial should be granted "only with great caution and in the most extraordinary circumstances." *United States v. Sanchez*, 969 F.2d 1409, 1414 (2d Cir.1992) (citation omitted). In order to grant such a motion, "[t]here must be a real concern that an innocent person may have been convicted." *Id.* (footnote omitted). Such a concern is not present here. The testimony of Officer Hopson, who was not named in the indictments, is illustrative. His testimony recounting Custis's confession strongly supported the testimony of Wade and Mohr—and the jury's conclusion that Custis possessed the gun. In addition, Custis's own testimony of the events at the Springhill Market was largely consistent with that of the officers. Custis admitted that he had gone into the store with the cocaine, that he was crouched down picking up the cocaine when Officer Wade stopped him, that Officer Wade searched behind the video machines after stopping him, and that he told the officers that he would take the drug charge but not the gun charge. He differed with the officers only on the ultimate question of whether he possessed the gun and the eighteen bags of cocaine. The jury acquitted Custis of the intent to distribute charge, leaving only the question of the possession of the gun. The officers and Custis essentially agreed on the sequence of events leading up to Custis's arrest, and Custis's proximity to where the gun was found. Given these facts, we cannot say that the indictment was the sort of new evidence that "would probably produce an acquittal." *See Bales*, 813 F.2d at 1295. We conclude, therefore, that Custis has not established an exception to the general rule that the subsequent discovery of impeaching evidence does not justify a new trial.

III.

The district court enhanced Custis's sentence for his section 922(g) conviction under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1), because it found that he had three prior violent felony convictions. Custis claims that the district court erred when it refused to consider the constitutional validity of the challenged predicate convictions, one of which he claims was obtained in violation of his right to effective assistance of counsel, *see Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and two of which he claims were obtained without a knowing plea of guilt. *See Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

The district court declined to take evidence on the validity of these convictions. Initially, the court reasoned that *Burgett v. Texas*, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967), and *United States v. Tucker*, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972), held that predicate convictions obtained in violation of the right to counsel recognized in *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), cannot be used to enhance a sentence. The court then assured itself that Custis had been represented by counsel in his prior convictions and, thus, that there had been no violation of *Gideon*.

[3] The fact that the court acted scrupulously in determining that Custis's right to counsel had been observed, however, did not oblige it to take evidence on Custis's three remaining claims. The *Gideon* violations at issue in *Burgett* and *Tucker* are different in kind from other constitutional errors, including those asserted by Custis here. When a defendant has been deprived of counsel, he has lost his ability to assert all his other constitutional rights, either because he is ignorant of those rights or because he lacks the background and experience to press them effectively. *Johnson*

v. Zerbst, 304 U.S. 458, 465, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938).

Absent counsel, the judicial system has no assurance that the prior conviction reliably establishes the defendant's guilt. *See Linkletter v. Walker*, 381 U.S. 618, 639 n. 20, 85 S.Ct. 1731, 1743 n. 20, 14 L.Ed.2d 601 (1965). Without that reliability, even the federalism concerns that ordinarily counsel deference by federal courts to the judgments of state courts must give way. *See Tucker*, 404 U.S. at 448, 92 S.Ct. at 592. In recognizing the duty of district courts to entertain claims of *Gideon* violations in federal sentencing proceedings, we note that those claims will ordinarily lend themselves to facial review from the state court documents offered by the government to establish the conviction. The corresponding burden on courts and litigants should thus not be a heavy one. *See United States v. Jones*, 977 F.2d 105, 108 (4th Cir.1992) (*Jones II*) (uncounseled state court conviction is "prime example" of one "whose invalidity appears from available state court records.").

The same cannot be said, however, of the other claims pressed by Custis in his sentencing proceeding. Permitting defendants to challenge generally the constitutional validity of predicate convictions would place a substantial burden both on the prosecutors who will be forced to defend the predicate convictions used in sentence enhancement, and on the district judges who will be forced to hear those challenges. In this case, Custis raised no less than three separate constitutional challenges, all of them fact-intensive, to the validity of his prior convictions, which were several years old and which were from the state courts of Maryland. Requiring district courts to entertain such "first instance challenges to prior state convictions" poses a risk of unduly delaying and protracting the entire sentencing process. *Jones II*, 977 F.2d at 108–09. Even when the defendant's constitutional attack has no merit, establishing the validity of convictions that may be both geographically and temporarily distant presents considerable practical difficulties. Many of the challenged predicate convictions will be from state courts, and the procedures of those courts are likely to be unfamiliar to court and counsel. *See Lopez v. Beto*, 405 U.S. 473, 500, 92 S.Ct. 1014, 1027, 31 L.Ed.2d 374 (1972) (Rehnquist, J., dissenting). This unfamiliarity will be compounded by the fact that the attorneys of the state that convicted the defendant will not be there to defend that state's procedures. *Jones II*, 977 F.2d at 109. Moreover, the "inadequacy or unavailability of state court records and witnesses" from multiple or far-flung jurisdictions may further complicate the process. *Id.* Beyond these practical difficulties, permitting collateral attacks on predicate state convictions in federal sentencing proceedings impairs the values both of comity and federalism. It is true that in a federal sentencing proceeding the state is not asserting a direct interest in the validity of its conviction, but any "challenge to the validity of a state conviction implicitly questions in at least some part the integrity of the state's judicial process." *United States v. Gaylor*, 828 F.2d 253, 255 (4th Cir.1987). A final judgment of conviction thus commands respect, in whatever forum and for whatever purposes it has come under challenge. The admonition that "[f]ederal courts are not forums in which to relitigate state trials," *Barefoot v. Estelle*, 463 U.S. 880, 887, 103 S.Ct. 3383, 3392, 77 L.Ed.2d 1090 (1983), is not one that is limited to federal habeas corpus proceedings. In federal habeas corpus, Congress has at least provided a forum for the collateral review of state convictions. In federal sentencing proceedings, by contrast, the statutory mandate for reviewing predicate state convictions is far murkier.[2] The application of "the usual constraints on collateral review, such as waiver, bypass, cause, prejudice, and exhaustion" is, as the district court recognized, more problematic, even assuming that the presence of a procedural bar could be readily ascertained and asserted. 786 F.Supp. at 537. Given that federal sentencing proceedings are not the preferred forums for the review of state convictions, we have cautioned district courts that where a defendant has failed to attack his conviction on direct review or in a habeas

2. Congress has not specifically directed the federal courts to examine the validity of predicate convictions in sentencing proceedings. Nothing in 18 U.S.C. § 3661, which permits federal courts to consider any information concerning "the background, character, and conduct" of a defendant in sentencing, requires courts to entertain constitutional challenges to predicate convictions. *See United States v. Jones*, 907 F.2d 456, 466–67 (4th Cir.1990) (*Jones I*). Moreover, that statute is far less detailed than the federal habeas corpus procedures specified under 28 U.S.C. § 2254.

The Sentencing Guidelines also send conflicting signals on the propriety of entertaining constitutional challenges to predicate convictions. *Compare* U.S.S.G. § 4A1.2, comment. (n. 6) ("[S]entences resulting from convictions that a defendant shows to have been *previously ruled constitutionally invalid* are not to be counted.") (emphasis added) *with* U.S.S.G. § 4A1.2, comment. (backg'd) ("The Commission leaves for court determination the issue of whether a defendant may collaterally attack at sentencing a prior conviction."). Not surprisingly, the courts have reached conflicting results. *Compare United States v. Jakobetz*, 955 F.2d 786, 805 (2d Cir.1992) (courts have discretion to entertain challenges) *with United States v. Hewitt*, 942 F.2d 1270, 1276 (8th Cir.1991) (sentencing courts may only entertain challenges to already invalidated convictions). Even those courts that have allowed district courts to entertain attacks on predicate convictions have emphasized that they are not required to do so, and that considerations of finality and federalism counsel restraint in doing so. *See United States v. French*, 974 F.2d 687, 701 (6th Cir.1992). Finally, the district court concluded that constitutional challenges to predicate convictions under the Armed Career Criminal Act were precluded by the Supreme Court's decision in *Lewis v. United States*, 445 U.S. 55, 100 S.Ct. 915, 63 L.Ed.2d 198 (1980). In that case, the Court held that collateral challenges were not permitted under the predecessor statute to the substantive offense under which Custis was convicted, 18 U.S.C. § 922(g). Given our disposition of this case, we need not consider the applicability of *Lewis* to Congress's 1984 amendment adding the sentencing enhancement provisions of 18 U.S.C. § 924(e).

corpus proceeding, his "failure to have made the attempt will bespeak a recognized lack of basis for doing so, thus raising in question the basis now claimed for making the attempt in an even more attenuated collateral setting." *Jones II*, 977 F.2d at 109.

[4] For these reasons, we think that district courts are obliged to hear constitutional challenges to predicate state convictions in federal sentencing proceedings only when prejudice can be presumed from the alleged constitutional violation, regardless of the facts of the particular case; and when the right asserted is so fundamental that its violation would undercut confidence in the guilt of the defendant. *Cf. Rose v. Clark*, 478 U.S. 570, 577–79, 106 S.Ct. 3101, 3105–07, 92 L.Ed.2d 460 (1986) (citing introduction of coerced confession, complete denial of right to counsel, adjudication by biased judge, and direction of guilty verdict by court as constitutional violations where prejudice can be presumed). *But see Arizona v. Fulminante*, — U.S. —, — - —, 111 S.Ct. 1246, 1263–66, 113 L.Ed.2d 302 (1991) (applying harmless error analysis to introduction of coerced confession).

[5, 6] We now apply this test to the district court's resolution of Custis's claims. Custis claims that he was deprived of effective assistance of counsel during the proceedings leading up to his 1985 burglary conviction. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to make out a claim of ineffective assistance of counsel, however, a defendant must show that counsel's errors *prejudiced* his defense, "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687, 104 S.Ct. at 2064. *See also Perry v. Leeke*, 488 U.S. 272, 278–80, 109 S.Ct. 594, 599–600, 102 L.Ed.2d 624 (1989) (distinguishing *Strickland* claims requiring showing of prejudice from denial of counsel claims in which prejudice is presumed). Finding prejudice from counsel's alleged errors necessarily entails a fact-intensive inquiry, requiring extensive reference to the record in the original state proceeding. *Strickland*, 466 U.S. at 695, 104 S.Ct. at 2069 ("[A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury."). The court in *Jones II* recognized this problem and pointed to ineffective assistance of counsel claims as "notoriously" fact-specific, and "difficult of proof under any circumstances." 977 F.2d at 111.

[7–10] Custis also claims that two of his convictions were obtained without a knowing plea of guilt. *See Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). While prejudice to the defendant

can be presumed on direct appeal when the record does not affirmatively demonstrate that the defendant's plea of guilt was knowing, *see id.* at 244, 89 S.Ct. at 1713, this presumption does not carry over when a defendant attacks the intelligence of his plea collaterally. "On collateral review, we think it defies logic to presume from the mere unavailability of a transcript ... that the defendant was not advised of his rights." *Parke v. Raley*, — U.S. —, —, 113 S.Ct. 517, 524, 121 L.Ed.2d 391 (1992). *See also United States v. Timmreck*, 441 U.S. 780, 99 S.Ct. 2085, 60 L.Ed.2d 634 (1979) (absent showing of prejudice, Fed.R.Crim.P. 11 violation not cognizable in proceedings under 28 U.S.C. § 2255). When a defendant is represented by counsel when making his guilty plea, that plea is presumed valid when later attacked in a habeas corpus proceeding. *Marshall v. Lonberger*, 459 U.S. 422, 437, 103 S.Ct. 843, 852, 74 L.Ed.2d 646 (1983). In order to rebut that strong presumption of validity, the defendant must make a factual showing that his plea of guilt was not voluntary and intelligent. The appropriate forum for such a fact-intensive inquiry will typically be a state collateral proceeding or federal habeas corpus, not a sentencing hearing for a separate offense far removed from the original conviction.

[11] We conclude, therefore, that the district court did not err in declining to entertain Custis's constitutional challenge to the effectiveness of his counsel and to the validity of his guilty pleas. Those alleged violations did not carry with them the same presumption of prejudice that uncounseled pleas and convictions do. The multiple violations alleged by Custis could only have been established after fact-intensive investigations into state proceedings that are best undertaken in a different setting. Of course, if Custis is successful in making "a state or federal collateral attack upon the state sentence" during a habeas petition, for example, he may seek to revise any federal sentence in which the state conviction "was a factor." *Jones II*, 977 F.2d at 110 (citation omitted). No constitutional or statutory provision, however, obliges a federal sentencing court to entertain such challenges in the first instance.

IV.

Finally, Custis contends that his 1989 conviction in Maryland for attempted breaking and entering does not qualify as a violent felony for purposes of the sentencing enhancement in 18 U.S.C. § 924(e).[3] Custis contends that under Maryland law, attempted breaking and entering encompasses conduct such as lying in wait or reconnoitering the location of the crime. According to Custis, such conduct does not present "a serious potential risk of physical injury to another," 18 U.S.C. § 924(e)(2)(B)(ii), and thus his attempted breaking and entering conviction should not count as a violent felony for sentencing.

[12] We disagree. The Supreme Court has instructed that the need for uniform sentencing under section 924(e) requires "a formal categorical approach, looking only to the statutory definition of the prior offenses, and not to the particular facts underlying those convictions." *Taylor v. United States*, 495 U.S. 575, 600, 110 S.Ct. 2143, 2159, 109 L.Ed.2d 607 (1990). In applying such a categorical approach, we think that courts must necessarily make common-sense judgments about whether a given offense proscribes generic conduct with the potential for serious physical injury to another. The Maryland crime of which Custis was convicted includes as an element that the breaking and entering be into "the dwelling house of another." Md. Ann.Code art. 27, § 31A. *See also Warfield v. State*, 315 Md. 474, 554 A.2d 1238, 1249 (1989) (§ 31A intended to prohibit breaking and entering into "another person's home"). Such a building is likely to be occupied, thus creating a substantial risk of confrontation. *Compare United States v. Headspeth*, 852 F.2d 753, 758–59 (4th Cir.1988) ("storehouse breaking", Md. Ann.Code art. 27, § 32, held not to present a threat by its very nature because crime generally involved unoccupied buildings).

3. While this appeal was pending, the Circuit Court of Baltimore County entered an order deleting from the court file for Custis's 1989 conviction all references to "attempted burglary" and substituting the words "attempted breaking and entering." Custis filed a motion to supplement the record on appeal to reflect this order and we granted Custis's motion on January 22, 1993.

[13] In most cases, attempted breaking and entering will be charged when a defendant has been interrupted in the course of illegally entering a home. Interrupting an intruder while breaking into a home involves a risk of confrontation nearly as great as finding him inside the house. *United States v. O'Brien*, 972 F.2d 47, 52 (3d Cir.1992). We hold therefore that attempted breaking and entering "presents a serious potential risk of physical injury to another" and thus constitutes a violent felony for purposes of section 924(e)(2)(B)(ii). *Accord United States v. Payne*, 966 F.2d 4, 8 (1st Cir.1992) ("[R]isk of injury arises, not from the completion of the break-in, but rather from the possibility that some innocent party may appear on the scene while the break-in is occurring."). *See also United States v. Lane*, 909 F.2d 895, 903 (6th Cir.1990) (attempted burglary). *But see United States v. Strahl*, 958 F.2d 980, 986 (10th Cir.1992) (holding that attempted burglary does not qualify as a violent felony for section 924(e)); *United States v. Martinez*, 954 F.2d 1050, 1054 (5th Cir. 1992) (same).

V.

For the reasons given above, the case is remanded to the district court with directions to sentence defendant under 18 U.S.C. § 924(e) as an armed career criminal.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS.

ORDER

Appellee/cross-appellant's petition for rehearing and suggestion for rehearing en banc were submitted to this Court.

In a requested poll of the Court on the suggestion for rehearing en banc, Chief Judge Ervin and Judges Hall, Phillips, and Murnaghan voted to grant rehearing en banc; and Judges Russell, Widener, Wilkinson, Wilkins, Niemeyer, Hamilton, Luttig, and Williams voted to deny rehearing en banc.

This panel considered the petition for rehearing and is of the opinion that it should be denied. In denying rehearing and affirming the sentence imposed by the district court, the panel does not wish to be construed as condoning the district court's treatment of this circuit's precedent. The district court ruling preceded this circuit's decision in *Jones II* and the district court was thus without the benefit of its guidance. Regrettably, however, in the court of its discussion, the district court attempted improperly to reject the majority opinion in *Jones I*, and to draw upon the dissenting opinion in that case as authority for its position. 786 F.Supp. at 536–37. It should not need to be remarked that it is the opinion of the panel majority that binds and governs district courts within this circuit.

As the panel considered the petition for rehearing and is of the opinion that it should be denied, and as the majority of active circuit judges voted to deny rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing and suggestion for rehearing en banc are denied.

Entered at the direction of Judge Wilkinson, with the concurrence of Judge Russell and Judge Merhige (SUSDJ, ED/VA).

UNITED STATES of America

v.

Darren CUSTIS.

Crim. No. S 91-0334.

United States District Court,
D. Maryland.

March 16, 1992.

Defendant was found guilty of possessing cocaine and being a felon in possession of a firearm. At sentencing, the defendant sought to challenge prior convictions and made a motion for a new trial. The District Court, Smalkin, J., held that: (1) the defendant, who was being sentenced as an armed career criminal, could not collaterally attack prior convictions on the ground that he did not receive effective assistance of counsel, and (2) the interest of justice required granting a new trial after the arresting officers who had testified against the defendant were indicted for perjury in unrelated cases.

Motion for new trial granted.

1. Criminal Law ⇐700(3)

No *Brady* violation occurred when prosecutor failed to produce personnel files of police officers who testified against defendant; purpose of subpoenas for files was to determine whether files contained information relevant to new trial, and no information was contained in files requested before trial that would have been exculpatory.

2. Criminal Law ⇐986.2(4)

Prior convictions may not be used to enhance sentences if convictions are void for deprivation of opportunity to retain counsel or to have counsel appointed. U.S.C.A. Const.Amend. 6.

3. Criminal Law ⇐1202.13

Defendant who was being sentenced as armed career criminal could not collaterally attack prior convictions on grounds that he had been deprived of effective assistance of counsel. 18 U.S.C.A. § 924(e); U.S.C.A. Const.Amend. 6.

4. Criminal Law ⇐944

New evidence addressing credibility of witnesses normally does not justify new trial. Fed.Rules Cr.Proc.Rule 33, 18 U.S.C.A.

5. Criminal Law ⇐944, 945(2)

New trial was necessitated, in interest of justice, by arresting officers' indictments for perjury in unrelated cases; presence or absence of reasonable doubt in jurors' minds could be affected by knowledge of facts that affected credibility of arresting officers. Fed.Rules Cr.Proc.Rule 33, 18 U.S.C.A.

Richard D. Bennett, U.S. Atty., Robert E. Sims and Thomas DiBiagio, Asst. U.S. Attys., Baltimore, Md., for plaintiff.

Fred Warren Bennett, Federal Public Defender, Tyler C. Johnston and Mary French, Asst. Federal Public Defenders, Baltimore, Md., for defendant.

MEMORANDUM OPINION

SMALKIN, District Judge.

This criminal case under the Armed Career Criminal Act, 18 U.S.C. § 924(e) is before the Court on issues regarding the sentencing of Mr. Darren Custis and his motion for new trial.

First, Mr. Custis has challenged the constitutional validity of his prior convictions, arguing, *inter alia*, that he was denied effective assistance of counsel, as set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), as to two of his prior convictions. Mr. Custis contends that these convictions cannot be used to sentence him as a thrice-convicted armed career criminal. Thus, before addressing the arguments on the merits as to the various points raised by counsel going to the validity of the prior convictions, this Court examined the circumstances in which collateral attack should be allowed on prior convictions under 18 U.S.C. § 924(e). From its analysis, this Court now concludes that, with one narrow possible exception, collateral attacks on prior convictions should not be entertained at sentencing, for reasons that will be explained herein.

This opinion will also address the defendant's motion for new trial, based upon newly discovered evidence concerning the veracity of two Government witnesses. Specifically, two of the police officers who testified at the suppression hearing and at trial, and whose testimony constituted the principal evidence in support of Mr. Custis' conviction for possession of a firearm, have been indicted for perjury arising in the course of their work in an unrelated case. The indictments were filed after the trial in

this case, but before sentencing. The defendant argues that this new information concerning the officers seriously undermines confidence in the jury's guilty verdict on the firearms count in the present case. The Government, in turn, rejects the notion that a new trial should be granted upon these grounds. Because this Court finds that the law and the equities in this case support the grant of a new trial, defendant's new trial motion will be granted, as explained further below.

Factual Background

Mr. Custis was tried by jury in November of 1991 on a three-count indictment charging him with (1) possessing, with the intent to distribute, cocaine, (2) carrying a firearm in connection with a drug trafficking offense, and (3) possessing a firearm after having been convicted of a crime punishable by a term of imprisonment exceeding one year. At trial, three Baltimore City police officers testified on behalf of the Government. Two of the officers, Christopher Wade and John Mohr, originally arrested the defendant on state narcotics and firearms charges. As part of "Operation Triggerlock," a federal prosecution was undertaken pursuant to 18 U.S.C. §§ 922 and 924. A third officer testified regarding the defendant's purported admissions concerning the firearm. During the trial, Mr. Custis testified on his own behalf, admitting to possession of a small amount of cocaine for his personal use, but denying ownership and/or possession of the gun. After a three day trial, the defendant was convicted of the lesser-included offense of possession of cocaine, as well as the felon-in-possession of a firearm charge, in violation of 18 U.S.C. § 922(g) and § 924(e)(1), but was acquitted of the charge of carrying a firearm during the commission of a drug trafficking crime.

1. Perjury, although a misdemeanor under Maryland's common law classification of offenses, is punishable by 10 years' imprisonment. Md. Ann.Code of 1957 art. 27, § 439 (1992).

2. Prior to trial, the defendant had also moved *ex parte* for subpoenas for the police officers' personnel records. Those motions were denied, on the ground that the defendant had presented no particularized showing justifying the issuance of those subpoenas.

3. No information was contained in the files requested by defense counsel prior to trial that would have been exculpatory to the defendant under *Brady*.

[1] In February 199.. as the result of an investigation into an unrelated, earlier case conducted by the Baltimore City State's Attorney's Office, Officers Wade and Mohr were indicted for misdemeanor perjury, arising from allegedly false statements in applications for search warrants [1]. Subsequent to the indictment, defense counsel sought to obtain by subpoena all records regarding the state's investigation of these officers, as well as the officers' personnel records.[2] The purpose of the subpoenas was to determine whether or not those records contained information relevant to a motion for new trial. This Court subsequently quashed the subpoenas, pursuant to an Order requiring the prosecutor to submit an affidavit stating that, upon review, the records contained no *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), exculpatory information (including impeachment information) extant before the trial of Mr. Custis. The Court received the requisite affidavit prior to the sentencing hearing, and finds, on the basis of that affidavit and its attachments, that there was no violation of *Brady*[3] in the present case.

Collateral Attack on Prior Convictions Used to Calculate Armed Career Criminal Status

The Government here requests application of the Armed Career Criminal enhancement of 18 U.S.C. § 924(e) to Mr. Custis. The defendant must have been convicted of three prior violent felonies to trigger the enhancement, which raises the penalty for the felon-in-possession of a firearm charge under § 922(g) from a maximum of ten years to a minimum of fifteen years, with a maximum of life. 18 U.S.C. § 924(e)(1). Under U.S.S.G. § 4B1.4, the minimum possible guideline sentence is 188 months. Unlike the statutory scheme for enhancement of sentences in drug cases, the Armed Career Criminal Act provides no statutory right to challenge prior convictions relied upon by the Government for enhancement. *Compare* 18 U.S.C. § 924(e) *with* 21 U.S.C. § 851. Thus, the only relevant question is the extent to which any other statute, the Constitution itself, or case law gives the defendant such a right.

The only statute conceivably relevant is 18 U.S.C. § 3661, which provides simply that the Court may consider any relevant information at sentencing. That statute does little to shed light upon the present situation.

[2] The Constitution, as interpreted by the Supreme Court, appears to prohibit use of prior convictions to enhance sentences only where the convictions are void because the defendant was deprived of the opportunity to retain counsel, or, being indigent, was deprived of the opportunity to have counsel appointed. In other words, the conviction cannot be used to enhance only if it was obtained in violation of the rule in *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). *See United States v. Tucker*, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972); *Burgett v. Texas*, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967). (For reasons that follow, even this narrow prohibition may not apply in § 924(e) cases.)

[3] This Court knows of no binding authority on the point from the United States Court of Appeals for the Fourth Circuit. Other circuits have addressed the issue of collateral attack upon prior convictions at sentencing and have allowed defendants to challenge prior convictions on constitutional grounds other than deprivation of the right to counsel, without specifically addressing the origin and nature of the "right" to raise the challenge, but simply allowing it to proceed. *See, e.g., United States v. Day*, 949 F.2d 973, 980–81 (8th Cir.1991). This Court's analysis of *Day* and the cases collected therein, though, leads to the conclusion that, to the extent the cases have extended the rule of *Tucker* and *Burgett* to entertain collateral attacks in cases not involving the frank deprivation of the right to any representation by counsel, they are unsound.

For example, the passage from *Tucker*, 404 U.S. at 448–49, 92 S.Ct. at 592–93, relied upon in *Day*, 949 F.2d at 981, simply does not extend to guilty pleas in which counsel has incompetently performed; rather, *Tucker* concerned itself only with defendants who had been cut off from any right to counsel at all. A guilty plea that can be attacked on ineffective representation grounds is very different from a situation where the defendant never was afforded the right to see a lawyer at all, but was nonetheless convicted. It is only the latter situation that is so fundamentally unfair that a resulting conviction cannot be used for enhancement later under *Tucker*. *See United States v. Graves*, 554 F.2d 65, 82 (3d Cir.1977), *cited with approval in Grandison v. Warden*, 580 F.2d 1231, 1240–41 (4th Cir.1978), *cert. denied*, 440 U.S. 918, 99 S.Ct. 1239, 59 L.Ed.2d 469 (1979).

Furthermore, and most importantly, the decision in *Lewis v. United States*, 445 U.S. 55, 100 S.Ct. 915, 63 L.Ed.2d 198 (1980), should be read as foreclosing *any* collateral attack, whether before conviction on the § 924(e) underlying gun offense or at sentencing for it, on a predicate conviction, even where the predicate conviction could otherwise be challenged under *Tucker* and *Burgett*. Although *Lewis* did not directly involve § 924(e), it construed a gun control statute (since repealed) essentially *in pari materia* with § 924(e)'s base offense (18 U.S.C. § 922(g)), *viz.*, 18 U.S.C.App. former § 1202(a). If, as it appears, a conviction void under *Tucker* could be used as a predicate for convicting someone of the substantive firearms offense under *Lewis*, *a fortiori* it can be considered at sentencing on that offense, immune from collateral attack. This Court recognizes that *Lewis*, 445 U.S. at 67, 88 S.Ct. at 922, distinguished *Burgett* but that distinction is neither logically supportable nor persuasive. If the "void" prior conviction is "reliable" enough to support indictment and conviction, it is logically "reliable" enough to be a predicate for an enhanced sentence.

Additionally, this Court's basis for precluding collateral attack at sentencing (on grounds other than, possibly, total deprivation of counsel) includes the persuasive arguments made by Judge Wilkinson in his dissent in *United States v. Jones*, 907 F.2d 456 (4th Cir.1990), *cert. denied*, — U.S. —, 111 S.Ct. 683, 112 L.Ed.2d 675 (1991). Judge Wilkinson's cogent dissent need not be reiterated here, save to point out that, if the scope of collateral review of state court convictions in a federal sentencing proceeding extends to any and all constitutional flaws, then the sentencing court will most likely be conducting a plenary collateral review of up to three predicate convictions in every sentencing under § 924(e), without any state court post-conviction record, and without the usual constraints on collateral review, such as waiver, bypass, cause, prejudice, and exhaustion. *See, e.g., Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). Such a situation is folly, for the reasons stated by Judge Wilkinson in dissent in *Jones*, 907 F.2d at 470–84.

Finally, a word about *Jones* itself. *Jones* is not binding authority in this case, because it involved only construction and application of a (since repealed) provision of the Sentencing Guidelines, and it did not announce a supervisory or constitutional rule of general application in federal sentencings; neither does this Court consider *Jones* persuasive authority in this situation, for reasons amply stated above.

Thus, because defense counsel cannot establish that Mr. Custis, in his prior convictions, was denied the right to be represented by counsel (in fact, he was so represented), there is no occasion for any collateral review of those convictions at all during the sentencing proceedings. This Court is not, for reasons stated above, concerned with "ineffective representation" claims under the Sixth Amendment, Fourth Amendment claims, or claims of any sort other than the outright deprivation of the right to be represented under *Gideon*. Even if a predicate conviction was completely uncounseled, it is the opinion of the Court that *Lewis* would still bar collateral attack upon it, but that is a question upon which judgment need not be rendered in this case.

Motion for New Trial

Federal Criminal Rule 33 delineates the standard for a motion for new trial and provides, in pertinent part, that "[t]he court on motion of a defendant may grant a new trial to the defendant if required in the interest of justice."

[4, 5] The Government, in its opposition to defendant's motion, correctly points out the general rule in this Circuit that new evidence going to the credibility of witnesses normally does not justify a new trial. *See, e.g., United States v. Stockton*, 788 F.2d 210, 220 (4th Cir.), *cert. denied*, 479 U.S. 840, 107 S.Ct. 147, 93 L.Ed.2d 89 (1986). The present case, however, goes well beyond the normal one, where some impeaching tidbit is turned up after trial. Indeed, this case is much closer to *United States v. Atkinson*, 429 F.Supp. 880 (E.D.N.C.1977). There, the court noted:

> Newly discovered evidence that merely goes to impeach the credibility of a prosecution witness does not ordinarily warrant the granting of a new trial, ... but in some circumstances the newly discovered evidence, although impeaching[,] is sufficiently important in the ascertainment of the truth and in the interests of justice that a new trial should be ordered.

Id. at 885 (citations omitted). In the present case, this Court's confidence in the outcome of this trial is so severely undermined by the indictment of the two key witnesses for perjury that, in fairness and justice, the verdict cannot stand.

Officers Wade and Mohr were the arresting officers in the present case; the jury's belief in their testimony regarding Mr. Custis' possession of the firearm was, in the Court's opinion, essential to a finding of guilt. Of course, during the new trial, the defendant cannot introduce evidence of the officers' alleged perjury under Fed.R.Evid. 609 unless and until the officers have actually been convicted of that offense. Under Fed.R.Evid. 608(b), however, the underlying circumstances would be open to cross-

examination, subject, of course, to Rule 403 and Fifth Amendment constraints. In the discretion of this Court, the full extent of the officers' misconduct, if any [4], could be addressed during cross-examination. The presence of reasonable doubt in the minds of the jury may be very much affected by knowledge of the conduct of these officers, and a different verdict may result. *See Atkinson*, 429 F.Supp. at 887. The Court has considered that another officer testified as to allegedly incriminating oral statements made by the defendant the morning after his arrest, before he had seen a magistrate, and after he had been held in custody all night. This questioning violated a general order of the Police Department, and the whole testimony of that officer is such that it does little to repair the Court's shaken faith in the integrity of the verdict.

It is a sad day when the Government's key law enforcement witnesses in a criminal case stand indicted for perjury. While it may be true that the defendant is in fact guilty, our system of justice is designed to insure him the right to a fair trial, where the jury knows all the relevant facts, especially when the credibility of arresting officers is at issue. In order to preserve that right, a new trial must be granted here in the interests of fairness and justice.[5]

For the reasons outlined above, an order will be entered separately, *granting* defendant's motion for new trial.

4. Of course, the Court does not purport to have detailed knowledge of either the factual basis of the indictments or whether the charges are well-grounded in fact.

5. The Court is especially cognizant of the decrease in public confidence in the judiciary of England occasioned by recent revelations of police perjury during the 1970's, resulting from attempts to control the Irish Republican Army ("I.R.A."). This crisis of confidence in the independence and integrity of the English courts has led to demands for radical reform of the very mother of all common law courts. Trust in the English judiciary that had been built up by accretion—slowly over hundreds of years—is now going right out the window due to suspicion of police perjury. This Court cannot and will not tolerate even the hint of a like erosion of public confidence in the judiciary of this country. Sentencing Guidelines or no Sentencing Guidelines, Armed Career Criminal Act or no Armed Career Criminal Act, War on Drugs or No War on Drugs, Operation Triggerlock or no Operation Triggerlock, the basic principle underlying this Court's judgments must be to do that which is fair, just, and right.

APPENDIX C

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution, Section 1, provides that no "State [shall] deprive any person of life, liberty, or property, without due process of law . . . ."

STATUTES

Maryland Annotated Code article 27, § 31A (1992)

Md. Ann. Code article 27, § 31A provides:

Any person who breaks and enters the dwelling house of another is guilty of a misdemeanor and, upon conviction thereof, shall be sentenced to imprisonment for a term of not more than three (3) years or a fine of not more than five hundred dollars ($500.00) or both.

18 U.S.C. § 921, 922, and 924 (Supp. 1993); 18 U.S.C. § 3661 (1985)

1. 18 U.S.C. § 921(a)(20) states:

The term "crime punishable by imprisonment for a term exceeding one year" does not include --

(A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or

(B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

2. 18 U.S.C. § 922(g) provides:

It shall be unlawful for any person --

(1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

3. 18 U.S.C. § 924(e) provides, in pertinent part:

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g), and such person shall not be eligible for parole with respect to the sentence imposed under this subsection.

(2) As used in this subsection --

* * *

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year . . . that --

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . . .

4. 18 U.S.C. § 3661 provides:

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

APPENDIX C

CONSTITUTIONAL PROVISIONS

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2. 18 U.S.C. § 922(g) provides:

It shall be unlawful for any person --

(1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

3. 18 U.S.C. § 924(e) provides, in pertinent part:

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g), and such person shall not be eligible for parole with respect to the sentence imposed under this subsection.

(2) As used in this subsection --

* * *

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year . . . that --

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . . .

4. 18 U.S.C. § 3661 provides:

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

ORIGINAL

No. 93-5209

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

Supreme Court, U.S.
FILED
JUL 15 1993
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DARREN J. CUSTIS,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

CERTIFICATE OF SERVICE

I hereby certify and declare that true and exact copies of the Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit and Motion for Leave to Proceed in Forma Pauperis were mailed, first-class postage prepaid, this 14th day of July, 1993, to all parties required to be served as follows: The Solicitor General, Department of Justice, Washington, D.C. 20530.

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ORIGINAL

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

DARREN J. CUSTIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

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QUESTIONS PRESENTED

1. Whether the court of appeals properly held that petitioner may not collaterally attack two previous state convictions used for sentence enhancement under the Armed Career Criminal Act, 18 U.S.C. 924(e).

2. Whether attempted breaking and entering under Maryland law constitutes a "violent felony" for purposes of 18 U.S.C. 924(e).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 988 F.2d 1355. The opinion of the district court (Pet. App. 11a-16a) is reported at 786 F. Supp. 533.

JURISDICTION

The judgment of the court of appeals was entered on March 22, 1993. A petition for rehearing was denied on April 30, 1993. The petition for a writ of certiorari was filed on July 15, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted of possessing

cocaine, in violation of 21 U.S.C. 844,[1/] and of being a felon in possession of a firearm, in violation of 21 U.S.C. 922(g). He was sentenced to 235 months in prison, to be followed by three years of supervised release.

1. On July 1, 1991, two police officers approached an intersection known to be the site of extensive drug activity in Baltimore, Maryland. Several persons were standing on the corner in front of a convenience store. One of them called out a warning that officers were nearby. Petitioner fled into the store. As the officers followed petitioner into the store, they heard a "thump" in the area near the right wall, where petitioner was standing between two video machines. Pet. App. 3a-4a; Gov't C.A. Br. 3-4.

Petitioner tried to leave the store, but the officers stopped him. They searched the area near the right wall and found a loaded .38 caliber revolver on the floor between the two video machines. When petitioner was arrested, he dropped a small bag of cocaine. The officers also found 18 similar bags of cocaine against the wall next to the video machines. The next day, petitioner told a detective that the firearm belonged to him, and that he was an enforcer for a drug distribution ring. Pet. App. 4a; Gov't C.A. Br. 5.

1/ Petitioner was charged with possessing cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). The jury, however, found him guilty of the lesser included offense of simple possession. The jury acquitted petitioner of using of a firearm during a drug trafficking crime, in violation of 18 U.S.C. 924(c).

2. Prior to trial, the government filed a notice that it would seek an enhanced penalty under the Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e). Section 924(e) prescribes a 15-year mandatory minimum prison term for a defendant who violates 18 U.S.C. 922(g)(1) and "has three previous convictions * * * for a violent felony or a serious drug offense, or both, committed on occasions different from each other." The notice charged that petitioner had three prior state felony convictions: (1) a 1985 Pennsylvania robbery conviction; (2) a 1985 Maryland burglary conviction; and (3) a 1989 Maryland attempted burglary conviction. Pet. App. 4a; C.A. App. 258-259.

Petitioner challenged the use of his two Maryland convictions for sentence enhancement under Section 924(e). First, he argued that his 1985 burglary conviction had been obtained unconstitutionally because he had received ineffective assistance of counsel and had not entered a voluntary and intelligent guilty plea. Pet. App. 4a; C.A. App. 163-165. Petitioner challenged the constitutionality of his 1989 conviction on the ground that it had been based upon a "stipulated facts" trial; that the effect of such a trial was the same as that of a guilty plea; and that he had not been adequately advised of the rights he was waiving. Pet. 4; Pet. App. 4a. In addition, petitioner argued that his 1989 Maryland conviction was not a "violent felony" conviction for purposes of Section 924(e)

because he was convicted of attempted breaking and entering and not attempted burglary.[2/] Pet. App. 4a; C.A. App. 165-176.

The district court refused to entertain petitioner's collateral attacks on his two Maryland convictions. Pet. App. 12a-15a; C.A. App. 163-165, 175-176. It noted that "[u]nlike the statutory scheme for enhancement of sentences in drug cases [21 U.S.C. 851], the [ACCA] provides no statutory right to challenge prior convictions relied upon by the Government for enhancement." Pet. App. 13a-14a. The court then concluded that the Constitution prohibits the use of a prior conviction for sentence enhancement only when there was complete denial of counsel in the prior proceeding. Id. at 14a, citing Gideon v. Wainwright, 372 U.S. 335 (1963); United States v. Tucker, 404 U.S. 443 (1972); and Burgett v. Texas, 389 U.S. 109 (1967). Because petitioner was represented by counsel in the two Maryland cases, the district court found no occasion for any collateral review of his prior convictions in the sentencing proceedings. Pet. App. 15a. The court also ruled that petitioner's 1989 Maryland conviction was a "violent felony" for purposes of Section 924(e), regardless of whether it was for attempted burglary or attempted breaking and entering. C.A. App. 171-175.

Based on an offense level of 33 and a criminal history category of IV, the district court determined that petitioner's

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2/ At the time of the district court proceedings, the state court records indicated that petitioner's 1989 conviction was for attempted burglary. While his appeal was pending, the state court entered an order deleting the references to "attempted burglary" and substituting "attempted breaking and entering" in petitioner's court file. Pet. App. 9a n.3.

Guidelines range was 235-293 months in prison. The court sentenced petitioner to 235 months in prison. C.A. App. 191, 196.[3/]

3. The court of appeals affirmed. Pet. App. 1a-10a. The court noted that in Tucker and Burgett, this Court held that defendants may collaterally attack prior convictions used for sentencing purposes when the ground for challenging the prior convictions is that the defendant was denied counsel. Such claims, the court of appeals explained, are "different in kind from other constitutional errors" because the complete denial of counsel leaves the judicial system with "no assurance that the prior conviction reliably establishe[d] the defendant's guilt." Pet. App. 6a-7a. And because such claims "will ordinarily lend themselves to facial review from * * * state court documents offered by the government to establish the conviction," the court found that the burden of adjudicating claims of complete deprivation of counsel "should * * * not be a heavy one." Id. at 7a.

In contrast, the court of appeals found that permitting collateral attacks upon prior convictions used for sentence enhancement based on any constitutional claim would create significant practical impediments to the implementation of the sentence enhancement scheme. Pet. App. 7a.

3/ After sentencing, the district court granted petitioner's motion for a new trial because the two police officers who were witnesses in this case had been indicted in state court for perjury in an unrelated case. Pet. App. 15a-16a. The court of appeals reversed, finding that the circumstances did not warrant departure from the general rule that subsequent discovery of impeachment evidence does not warrant a new trial. Id. at 6a. Petitioner has not raised that issue before this Court.

> Even where the defendant's constitutional attack has no merit, establishing the validity of convictions that may be geographically and temporally distant presents considerable practical difficulties. Many of the challenged predicate convictions will be from state courts, and the procedures of those courts are likely to be unfamiliar to court and counsel. This unfamiliarity will be compounded by the fact that the attorneys of the state that convicted the defendant will not be there to defend that state's procedures. Moreover, the "inadequacy or unavailability of state court records and witnesses" from multiple or far-flung jurisdictions may further complicate the process.

Ibid. (citations omitted). The court added that "permitting collateral attacks on predicate state convictions in federal sentencing proceedings impairs the values both of comity and federalism." Ibid.

The court of appeals accordingly held that "district courts are obliged to hear constitutional challenges to predicate state convictions in federal sentencing proceedings only when prejudice can be presumed from the alleged constitutional violation, regardless of the facts of the particular case; and when the right asserted is so fundamental that its violation would undercut confidence in the guilt of the defendant." Pet. App. 8a. Because petitioner's challenges to his two prior Maryland convictions did not satisfy that standard, the court of appeals held that the district court properly declined to consider petitioner's constitutional challenge to his prior convictions at sentencing. Id. at 9a.

The court of appeals also rejected petitioner's contention that his 1989 conviction for attempted breaking and entering was not a "violent felony" for purposes of Section 924(e). Because the offense of breaking and entering under Maryland law requires breaking and entering into "the dwelling house of another," the court found that "attempted breaking and entering 'presents a serious potential risk of physical injury to another' and thus constitutes a violent felony" for purposes of Section 924(e). Pet. App. 9a-10a (citation omitted).

ARGUMENT

1. Petitioner contends (Pet. 7-15) that the courts below erred in holding that a criminal defendant may not challenge the constitutionality of prior convictions used to enhance his sentence under the Armed Career Criminal Act, 18 U.S.C. 924(e). We believe that petitioner's collateral attack upon his prior final convictions is not cognizable under Section 924(e), and that it is also not authorized by the Constitution. Because the courts of appeals are divided on those two related issues, however, we agree that the first question presented in the petition warrants this Court's review.

a. The ACCA does not require a district court to entertain a defendant's collateral attack on a prior final state conviction used for sentence enhancement under 18 U.S.C. 924(e). The relevant language of Section 924(e) enhances the sentence of any person who "violates [18 U.S.C.] 922(g) * * * and has three previous convictions by any court referred to in [18 U.S.C.] 922(g)(1) * * * for a violent felony or a serious drug offense, or both, committed on occasions different from each other."

Because Section 924(e) applies whenever a defendant "has three previous convictions" of the specified character, its plain terms

focus on the fact or existence of the prior convictions. The statutory language nowhere suggests that, in addition, prior final convictions must be subject to scrutiny for potential constitutional error before they may be counted under Section 924(e).

The definitional provision of the ACCA, moreover, makes clear that unchallenged prior convictions may be used for purposes of Section 924(e). In enumerating the limited circumstances in which a prior conviction may be excluded under the ACCA, 18 U.S.C. 921(a)(20) provides that "[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter [18 U.S.C. 921-930]." By specifying that a court may not count any conviction "which has been * * * set aside" (18 U.S.C. 921(a)(20) (emphasis added)), Congress gave strong indication that courts may rely on prior final convictions if they have not previously been set aside.

That conclusion is supported, moreover, by the general rule that a prior final conviction "carries with it a presumption of regularity." Johnson v. Zerbst, 304 U.S. 458, 468 (1938). And where, as here, prior state convictions are involved, full faith and credit principles require federal courts to respect final state court judgments, unless Congress "plainly state[s]" to the contrary. See Kremer v. Chemical Construction Corp., 456 U.S. 461, 485 (1982); 28 U.S.C. 1738.[4]

[4] In contrast with Section 921(a)(20), other federal criminal statutes have stated expressly when a defendant may collater-
(continued...)

The court of appeals' decision in this case, however, conflicts with the decisions of several other courts of appeals. See United States v. Paleo, 967 F.2d 7, 11-14 (1st Cir. 1992) (defendant may challenge validity of guilty plea underlying prior final conviction used for sentence enhancement under Section 924(e)); United States v. Gallman, 907 F.2d 639, 642-645 (7th Cir. 1990) (same), cert. denied, 111 S. Ct. 1110 (1991); United States v. Young, 979 F.2d 1280, 1281 (8th Cir. 1992) (same), cert. denied, 113 S. Ct. 1604 (1993); United States v. Cornelius, No. 92-3270 (8th Cir. July 30, 1993), slip op. 3-4 (same); United States v. Lewis, 991 F.2d 524, 526-527 (9th Cir. 1993) (competence to plead guilty in prior case), petition for cert. pending, No. 93-5142.[5] In light of the conflict among the courts of appeals on this important question of statutory interpretation, we do not oppose this Court's review of that issue.

b. The courts below correctly held that the Constitution does require consideration of petitioner's collateral attacks upon his

[4] (...continued)
ally attack a prior conviction used to enhance his sentence. For example, 21 U.S.C. 851(c) sets forth specific procedures permitting a defendant to challenge the validity of a prior conviction used to enhance the sentence for a federal drug offense. Similarly, the now-repealed dangerous special offender statute provided that "[a] conviction shown on direct or collateral review or at the [sentencing hearing] to be invalid * * * shall be disregarded." 18 U.S.C. 3575(e) (1982).

[5] A number of decisions have also rejected on the merits constitutional challenges to prior convictions used under Section 924(e) without explicitly analyzing whether the ACCA permits such collateral attacks. See, e.g., United States v. Stewart, 977 F.2d 81, 84-85 (3d Cir. 1992), cert. denied, 113 S. Ct. 1443 (1993); United States v. Simmons, 961 F.2d 183, 186-187 (11th Cir. 1992), cert. denied, 113 S. Ct. 1591 (1993).

two prior final convictions before those convictions may be used to support an enhanced sentence. That conclusion is consistent with well-settled principles of sentencing. This Court has repeatedly held that sentencing courts may consider a broad range of factors in determining the appropriate sentence. See Chapman v. United States, 111 S. Ct. 1919, 1927 (1991); United States v. Grayson, 438 U.S. 41, 49-50 (1978); Williams v. New York, 337 U.S. 241, 246-247 (1949). As the Court explained in Chapman, a person convicted of a federal offense "is eligible for, and [a] court may impose, whatever punishment is authorized by statute for his offense, so long as that penalty is not cruel and unusual, and so long as the penalty is not based on an arbitrary distinction that would violate the Due Process Clause of the Fifth Amendment." 111 S. Ct. at 1927.6/

When a prior conviction has become final, a "presumption of regularity" attaches (Johnson v. Zerbst, 304 U.S. at 468), and a court is entitled to presume that the defendant "stands fairly and finally convicted." United States v. Frady, 456 U.S. 152, 164 (1982). That presumption, moreover, has special force when the conviction results from a guilty plea. See Hill v. Lockhart, 474 U.S. 52, 58 (1985); United States v. Timmreck, 441 U.S. 780, 784 (1979). Thus, Congress may rationally use a prior final conviction to identify a defendant as a more serious offender -- without first permitting him to raise every claim of error that could have been

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6/ Petitioner has not alleged that his sentence violates the Eighth Amendment guarantee against cruel and unusual punishments.

but was not raised on appeal or in a prior collateral attack on the predicate conviction.

This Court has recognized certain limits on the freedom of Congress and the States to rely on previous convictions for use in sentencing. Specifically, the Court has held that uncounseled prior felony convictions may not be used for sentence enhancement, Burgett v. Texas, 389 U.S. 109 (1967), or for purposes of sentencing in general. United States v. Tucker, 404 U.S. 443 (1972). But those cases are not applicable here. In both Burgett and Tucker, the subsequent conviction or sentence "depended on the reliability of a past uncounseled conviction." Lewis v. United States, 445 U.S. 55, 67 (1980). Yet the complete denial of counsel in a felony case implicates "the very integrity of the fact-finding process," and an uncounseled felony conviction inherently "lack[s] reliability." Linkletter v. Walker, 381 U.S. 618, 639 (1965). In contrast, where a collateral attack on a prior conviction does not involve complete denial of the right to counsel or a fundamental error of similar magnitude, Congress may rationally rely on the fact of the prior conviction as an indicator of the offender's likely dangerousness.7/

7/ We made the same point in our brief amicus curiae in Parke v. Raley, 113 S. Ct. 517 (1992). See No. 91-719 U.S. Br. 10-18. The Court did not reach that issue, however, because it had not been preserved in the courts below. See 113 S. Ct. at 522-523. The Court did, however, sustain Kentucky's career offender statute, which allowed collateral attacks at sentencing but placed the burden of production on the defendant. In so doing, the Court relied heavily on the fact that when a defendant challenges a prior final conviction in a subsequent sentencing proceeding, the predicate conviction is entitled to "the 'presumption of regu-

(continued...)

Petitioner's claims do not approach the level of fundamental error that the Court addressed in Burgett and Tucker. With respect to his 1985 Maryland conviction, petitioner claims that he received ineffective assistance in relation to his decision whether to plead guilty. Congress may rationally determine that a prior conviction is relevant to sentencing without the need to resolve such a claim. In general, this Court has explained that "[a]ttorney errors come in an infinite variety and are as likely to be utterly harmless in a case as they are to be prejudicial." Strickland v. Washington, 466 U.S. 668, 693 (1984). And where a guilty plea is involved, the interest in finality is greater, and "the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised." Hill v. Lockhart, 474 U.S. at 58.[8/] A defendant challenging his guilty plea accordingly must establish not only constitutionally ineffective lawyering, but also "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted upon going to

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7/ (...continued)
larity' that attaches to final judgments, even when the question is waiver of constitutional rights." Id. at 523. The court also emphasized that "[f]or much of our history, it appears that state courts altogether prohibited defendants in recidivism proceedings from challenging prior convictions as erroneous, as opposed to void for lack of jurisdiction." Id. at 525. Those observations strongly support limiting the availability of collateral relief in this context.

8/ There is a presumption that counsel advised a defendant of everything needed to enter a voluntary and intelligent guilty plea. See Marshall v. Lonberger, 459 U.S. 422, 436-437 (1983); Henderson v. Morgan, 426 U.S. 637, 647 (1976).

trial." Id. at 59.[9/] In light of the strong presumption of finality that attaches to a conviction entered pursuant to a guilty plea, the heavy burden on the defendant seeking to overturn such a conviction, and the largely predictive nature of the inquiry into ineffective assistance of counsel, Congress is entitled to treat a prior final conviction as a rational sentencing factor without first allowing the defendant to litigate an ineffective-assistance-of-counsel claim that he could have, but did not, previously raise.

Petitioner also claims that his 1989 Maryland conviction was invalid because it resulted from a stipulated facts trial, and he was not advised of the rights he was waiving in agreeing to that procedure. That claim is based on this Court's decision Boykin v. Alabama, 395 U.S. 238 (1969), which requires state courts to place on the record facts showing that a defendant who pleads guilty is aware of certain rights being waived by entering that plea.[10/] Even if Boykin did extend to stipulated-facts trials, its prophylactic requirements do not rise to the level of fundamental error required to invoke Burgett and Tucker. See Parke v. Raley, 113 S. Ct. at 523 (holding that Boykin's presumption of invalidity does

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9/ This, in turn, will frequently require a prediction about the effect an attorney error might have had upon the trial. Thus, for example, where an attorney fails to advise his client of a possible defense, the prejudice inquiry "depend[s] largely on whether the affirmative defense likely would have succeeded at trial." Hill v. Lockhart, 474 U.S. at 59.

10/ In Boykin, the Court noted that a guilty plea waives (1) the privilege against compulsory self-incrimination, (2) the right to a jury trial, and (3) the right to confront adverse witnesses. The Court in Boykin declined to "presume a waiver of these three important federal rights from a silent record" on direct appeal. 395 U.S. at 243.

not extend to collateral attacks on final convictions); cf. United States v. Timmreck, 441 U.S. at 783 (technical violation of similar prophylactic requirements of Fed. R. Crim. P. 11 "is not a fundamental defect"); Halliday v. United States, 394 U.S. 831 (1969) (per curiam) (no retroactive application of decision construing Fed. R. Crim. P. 11).

Although the courts below therefore properly declined to consider petitioner's collateral challenge to his prior convictions, there is a conflict among the circuits on the extent to which the Constitution requires collateral relief to be available in this context.[11/] The court of appeals in this case held that "district courts are obliged to hear constitutional challenges to predicate state convictions in federal sentencing proceedings only when prejudice can be presumed from the alleged constitutional violation, regardless of the facts of the particular case; and when the right asserted is so fundamental that its violation would undercut confidence in the guilt of the defendant." Pet. App. 8a. Several other courts of appeals have recognized that collateral attacks upon a prior convictions used for sentencing are required

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11/ The question whether the Constitution requires that a defendant be allowed to collaterally attack a prior conviction used to enhance his sentence arises not only under the ACCA but also under the Sentencing Guidelines. As petitioner notes (Pet. 9 n.5), the courts of appeals are divided over whether the commentary to Guidelines § 4A1.2 requires district courts to entertain collateral attacks on prior convictions used to calculate sentences under the Guidelines. That issue of Guidelines interpretation does not warrant this Court's review because the Sentencing Commission has submitted an amendment to resolve the conflict. The amendment will take effect on November 1, 1993, unless Congress enacts legislation rejecting it. See 58 Fed. Reg. 27,148, 27,160 (May 6, 1993).

only in limited circumstances. See, e.g., United States v. Isaacs, No. 92-2129 (1st Cir. June 22, 1993), slip op. 15-16 ("unless a defendant's claim is that a prior conviction is unconstitutional on its face, the sentencing court has no constitutional authority to review that conviction before using it to enhance a defendant's [sentence]"); United States v. Roman, 989 F.2d 1117, 1120 (11th Cir. 1993) (en banc) (Constitution requires district courts to consider attack upon the validity of prior conviction only when defendant asserts facts showing that the conviction is "presumptively void"), petition for cert. pending, No. 93-5464; United States v. Elliott, 992 F.2d 853, 856-858 (8th Cir. 1993) (district courts must entertain collateral attack on prior conviction only when the alleged constitutional infirmity undermines a conviction's reliability as an indicator of guilt or erodes the authority relied on for the underlying claim of error), petition for cert. pending, No. 93-5570. On the other hand, in United States v. Vea-Gonzales, 986 F.2d 321, 327 (9th Cir. 1993), the Ninth Circuit broadly held that "the Constitution requires that defendants be given the opportunity to collaterally attack prior convictions that will be used against them at sentencing." In light of the conflict among the circuits on this important and recurring constitutional question -- as well as the related question of statutory interpretation (see pages 7-9, supra) -- we believe that this Court's review is appropriate.

2. Petitioner contends (Pet. 16-18) that his 1989 Maryland conviction for attempted breaking and entering does not qualify as

a predicate offense under the ACCA because it is not a "violent felony" conviction. The court of appeals correctly rejected that claim.

Under 18 U.S.C. 924(e)(2)(B)(ii), the term "violent felony" means any felony offense that "is burglary, arson, extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." In Taylor v. United States, 495 U.S. 575, 599 (1990), the Court held that a court making a determination under that provision should "look only to the fact of conviction and the statutory definition of the prior offense," and not "to the particular facts underlying th[e] conviction[]." Id. at 600, 602.

The court of appeals in this case properly applied Taylor in holding that the offense of attempted breaking and entering under Maryland law "presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii). As the court of appeals explained, courts applying the categorical approach of Taylor "must necessarily make common-sense judgments about whether a given offense proscribes generic conduct with the potential for serious physical injury to another." Pet. App. 9a. Because breaking and entering under Maryland law requires "breaking and entering * * * into 'the dwelling house of another,'" the court explained that attempted breaking and entering usually "will be charged when a defendant has been interrupted in the course of illegally entering a home." Id. at 9a, 10a. Because that conduct carries with it a serious risk of confrontation with the occupant, the court below

correctly held that it constitutes a "violent felony." Id. at 10a; cf. Taylor, 495 U.S. at 588 ("The fact that an offender enters a building to commit a crime creates the possibility of a violent confrontation between the offender and an occupant, caretaker, or some other person who comes to investigate.").

Petitioner argues (Pet. 18) that further review is warranted to resolve a conflict among the circuits on the question whether attempted burglary constitutes a violent felony. To be sure, the Tenth Circuit in United States v. Strahl, 958 F.2d 980, 986 (1992), held that attempted burglary, as defined by Utah law, does not generically involve a serious potential risk of physical injury, because the offense may be based on "conduct such as making a duplicate key, 'casing' the targeted building, obtaining floor plans of a structure, or possessing burglary tools." Moreover, the Fifth Circuit in United States v. Martinez, 954 F.2d 1050, 1054 n.3 (1992), reached a similar conclusion because "under Texas law a defendant could be convicted of attempted robbery long before he encountered another person." In contrast, two courts of appeals have interpreted Massachusetts law, and one has construed Michigan law, in a way that categorizes "attempted burglary" as a "violent felony." United States v. O'Brien, 972 F.2d 47, 50-53 (3d Cir. 1992) (Massachusetts law), petition for cert. pending, No. 93-5095; United States v. Payne, 966 F.2d 4, 8-9 (1st Cir. 1992) (Massachusetts law requires "conduct closer to completing the offense, for example, coming onto the premises and being scared off or trying and being unable to break the lock"); United States v. Fish, 928

F.2d 185, 186-188 (6th Cir.) (Michigan law), cert. denied, 112 S. Ct. 115 (1991).

For two reasons, this case does not present an appropriate vehicle for addressing any divergence among the approaches of the courts of appeals. First, although petitioner argues that he is seeking further review to correct an alleged misapplication of the categorical approach of Taylor, the substance of his argument is instead that the court of appeals simply misread the Maryland law of attempt.[12/] Petitioner's contention (Pet. 17-18) that Maryland law, properly interpreted, is analogous to the state laws at issue in Strahl and Martinez is not an issue requiring this Court's review to ensure the uniformity of federal law. Second, even if petitioner prevailed in his motion to suppress the 1989 Maryland conviction, he would remain eligible for sentencing as a career criminal under Section 924(e). Apart from the convictions listed in the government's pretrial notice, the presentence report also indicates that petitioner was found guilty of a delinquent act involving first degree murder and use of a handgun in a Maryland juvenile adjudication. C.A. App. 277. Under Section 924(e)(2)(B), the term "violent felony" includes "any act of juvenile delinquency involving the use or carrying of a firearm, knife or destructive device that would be punishable by imprisonment for [more than one

12/ Consistent with Taylor's categorical approach, the court of appeals did not look to the particular facts of this case in making its determination under Section 924(e)(2)(B)(ii), but considered whether Maryland law defines attempted burglary in a way that generally points to a serious potential risk of physical harm. See Pet. App. 9a-10a.

year] if committed by an adult."[13/] Because the 1981 adjudication qualifies under that subsection, the government may rely on that conviction on remand if petitioner's 1989 conviction is excluded on the ground that it is not a violent felony conviction under Maryland law.

CONCLUSION

The petition for a writ of certiorari should be granted with respect to Question No. 1. In all other respects, the petition should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

JOSEPH C. WYDERKO
Attorney

SEPTEMBER 1993

13/ Petitioner did not contest in the courts below that the 1981 juvenile adjudication qualified as a "violent felony" under the ACCA, but argued that the government was not entitled to rely upon it because it had not been included in the original notice. See Gov't C.A. Reply Br. 13-14. The ACCA, however, does not require the government to provide a defendant with formal notice of the predicate convictions upon which it will rely under Section 924(e). See United States v. Alvarez, 972 F.2d 1000, 1006 (9th Cir. 1992), cert. denied, 113 S. Ct. 1427 (1993). In any case, petitioner was given notice of the juvenile adjudication in his presentence report, more than a month before sentencing. Gov't C.A. Reply Br. 13.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

NO. 93-5209

DARREN J. CUSTIS, PETITIONER

V.

UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES** by first-class mail, postage prepaid, this 15th day of SEPTEMBER 1993.

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No. 93-5209

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

DARREN J. CUSTIS

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

REPLY BRIEF OF MR. CUSTIS

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District of Maryland

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8 pp

TABLE OF AUTHORITIES

CASES:	Page
Taylor v. United States, 495 U.S. 575 (1990)	2, 3, 4
United States v. Lane, 909 F.2d 895 (6th Cir. 1990), cert. denied, 498 U.S. 1093 (1991)	1, 2, 4
United States v. Martinez, 954 F.2d 1050 (5th Cir. 1992)	1, 3
United States v. O'Brien, 972 F.2d 47 (3rd Cir. 1992)	2, 4
United States v. Payne, 966 F.2d 4 (1st Cir. 1992)	2
United States v. Strahl, 958 F.2d 980 (10th Cir. 1992)	1, 3
United States v. Thomas, ___F.2d___, 1993 Westlaw 317076, 1993 Lexis 21459 (4th Cir. August 23, 1993)	3
Young v. State, 303 Md. 298, 493 A.2d 352 (1985)	4
STATUTES	
18 U.S.C. Section 924(e)(2)(C)	2, 3, 4
Armed Career Criminal Act	passim

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The Respondent agrees that certiorari should be granted with respect to Question No. 1. Therefore, this Reply addresses Respondent's arguments only with respect to Question No. 2, whether attempted breaking and entering is a violent felony for purposes of sentencing enhancement under the Armed Career Criminal Act.

1. Respondent acknowledges, as it must, that there is a circuit conflict on Question No. 2. The court of appeals for the Fourth Circuit specifically acknowledged that circuit conflict, pointing out that the Fifth and Tenth circuits have held that attempted burglary does not qualify as a violent felony for section 924(e). App. at 10a; see United States v. Martinez, 954 F.2d 1050 (5th Cir. 1992)(acknowledging contrary holding in Sixth Circuit); United States v. Strahl, 958 F.2d 980 (10th Cir. 1992). The Fourth Circuit expressly joined three circuits which have reached the opposite conclusion. App. 10a; see United States v. Lane, 909 F.2d

895, 902-03 (6th Cir. 1990), cert. denied, 498 U.S. 1093 (1991); United States v. O'Brien, 972 F.2d 47, 52 (3rd Cir. 1992), petition for cert. pending (acknowledging split in the circuits); United States v. Payne, 966 F.2d 4, 8-9 (1st Cir. 1992)(acknowledging contrary holding in Fifth Circuit).

Despite the manifest confusion among the lower courts, Respondent suggests that certiorari should not be granted, characterizing Mr. Custis' argument as being merely that the court of appeals misread the Maryland law of attempt. That characterization is incorrect. The circuit conflict has arisen not because of the vagaries of state law, but because the courts of appeals have not uniformly applied the categorical approach required by Taylor v. United States, 495 U.S. 575 (1990). Taylor held that section 924(e) "mandates a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." Taylor at 600. This categorical approach is designed to ensure uniformity and avoid a sentencing scheme in which "a particular crime might sometimes count towards enhancement and sometimes not, depending on the facts of the case." Id. at 601.

The courts of appeals have diverged in interpreting this standard. Some courts, such as the Fifth and Tenth Circuits, have examined the elements of the offense to determine whether the offense by its nature (i.e., in every case) poses a serious potential risk of physical injury to another. These courts have concluded that attempted burglary does not pose such a risk,

primarily because entry is not an element of the offense. United States v. Martinez, 954 F.2d 1050, 1053-54 (5th Cir. 1992); United States v. Strahl, 958 F.2d 980, 985-86 (10th Cir. 1992).

Other courts, including the court below, have failed to apply the categorical approach. The Fourth Circuit did not examine the statutory elements of attempted breaking and entering; instead the court relied on its belief that "[i]n most cases, attempted breaking and entering will be charged when a defendant has been interrupted in the course of illegally entering a home." App. 10a (emphasis supplied). The Fourth Circuit's opinion directly violates the categorical approach of Taylor.

Thus, petitioner's argument is not that the court of appeals misinterpreted Maryland law, but rather that it entirely failed to examine state law in the manner Taylor requires. The Fourth Circuit's ruling on this issue has implications extending well beyond the borders of Maryland. Based solely on the reasoning of Custis, the Fourth Circuit recently held that attempted burglary under New Jersey law qualifies as a violent felony under section 924(e). United States v. Thomas, __ F.2d __, slip. op. at 3, 1993 Westlaw 317076, 1993 Lexis 21459 (4th Cir. August 23, 1993). In Thomas, the court again failed to follow the categorical approach, and did not examine the statutory elements of the New Jersey statute. This approach is directly contrary to the analysis mandated by Taylor.[1]

[1] Similarly, the Sixth and Third Circuits have misapplied Taylor in examining whether attempted breaking and entering and attempted burglary count as violent felonies under section 924(e).

Respondent is incorrect in stating that review would not ensure the uniformity of federal law. Twenty four states have adopted some form of the Model Penal Code substantial step test for attempts, and ten federal circuits have also adopted the substantial step test. Young v. State, 303 Md. 298, 314, 493 A.2d 352, 361 (1985)(compiling cases and statutes). Review in this case would establish a uniform rule for federal courts reviewing prior attempt convictions from these jurisdictions.

2. Respondent also claims that Question No. 2 is not worthy of review because, if Mr. Custis prevails on the issue, he might still be eligible for an enhanced sentence on remand based on a 1981 finding of juvenile delinquency. This argument is meritless. The government never attempted to rely on the finding of juvenile delinquency as a predicate conviction in the district court. Instead, it expressly relied on other convictions. The government attempted to raise this issue for the first time before the court of appeals. However, the court below did not rule on whether the alleged act of juvenile delinquency qualifies under section 924(e). Accordingly, the government's argument shows at most that remand might be necessary if this Court ultimately ruled in petitioner's favor. The same can be said of most cases this Court reviews.

The Sixth Circuit focused on the elements of the completed crime of burglary, rather than the elements of attempted burglary. Lane, 909 F.2d at 903. The Third Circuit in O'Brien, 972 F.2d at 53, examined the defendant's actual conduct, which is directly contrary to Taylor because it makes enhancement depend on the facts of the prior case.

It is unlikely, however, that a remand would be necessary. An act of juvenile delinquency does not count for enhancement under the ACCA unless there is a "finding that a person has committed an act of juvenile delinquency involving a violent felony." 18 U.S.C. section 924(e)(2)(C). There was no such finding in Mr. Custis' case. Thus, it is clear that the 1981 delinquency finding does not count as a prior conviction under section 924(e).[2]

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted with respect to both questions presented.

Respectfully submitted,

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*Counsel of Record

September, 1993

---

[2] Respondent is mistaken in asserting that Mr. Custis did not argue in the court of appeals that the delinquency finding does not qualify as a violent felony under the ACCA. Resp. Brief at 19 n.13. Mr. Custis expressly argued, inter alia, that the delinquency finding was not a violent felony. Mr. Custis C.A. Reply Br. at 12.

No. 93-5209

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OCTOBER TERM, 1993

DARREN J. CUSTIS,

Petitioner

v.

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Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the Reply Brief for Darren J. Custis, was mailed, first class postage prepaid, this 24th day of September, 1993 to The Solicitor General, Department of Justice, Washington, D.C. 20530.

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DARREN J. CUSTIS,

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UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

JOINT APPENDIX

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158 pp

TABLE OF CONTENTS

Page

Relevant Docket Entries 1

Indictment 3

Notice/Information of Enhanced Penalty 6

Indictment (redacted copy) 8

Transcript of Proceedings, Circuit Court for Baltimore City, December 11, 1985 10

Transcript of Proceedings, Circuit Court for Baltimore County, October 17, 1989 43

Transcript of Sentencing, March 6, 1992 49

Judgment and Sentence, March 6, 1992 117

United States v. Custis, 786 F. Supp. 533 (D. Md. 1992) 124

United States v. Custis, 988 F.2d 1355 (4th Cir. 1993) (opinion and order denying rehearing) 135

Order of Supreme Court of the United States Granting Certiorari limited to Question 1 Presented by the Petition and Leave to Proceed in Forma Pauperis, October 12, 1993 156

RELEVANT DOCKET ENTRIES

Date	Proceedings
1991	
Sept. 11	Indictment filed
Sept. 12	Notice/Information of Enhanced Penalty
Sept. 27	Defendant Arraigned and pleaded not guilty as to Count Nos. 1-3
Nov. 18	Jury Trial - Day #1
Nov. 19	Jury Trial - Day #2
Nov. 20	Jury Trial - Day #3
Nov. 21	Verdict: Not guilty of the offense as charged in Count 1 but guilty of the lesser - included offense as to Count 1; not guilty as to Count 2; and guilty as to Count 3
1992	
Feb. 28	Letter/Order dated February 27, 1992 to counsel of record regarding the sentencing of defendant as therein set forth
March 5	Letter dated March 5, 1992 to counsel regarding prior convictions
March 6	Oral Motion of Defendant for a New Trial, for reasons stated in open court
March 9	Order that the defendant's oral motion for new trial is granted and his retrial will commence Monday, May 18, 1992 at 10:00 a.m.
March 9	Judgment as to defendant
March 17	Memorandum Opinion dated March 16, 1992 as to the defendant

March 25 Notice of Appeal of United States

March 27 Notice of Cross-Appeal of Defendant

1993

May 10 Judgment of the U.S. Court of Appeals for the Fourth Circuit, affirming in part and reversing in part, and remanding the case to the district court with instructions

May 11 Order that the order granting a new trial is hereby vacated and the defendant's commitment pursuant to the judgment of this Court on March 9, 1992, is hereby ratified and continued in force as therein set forth

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA v. DARREN J. CUSTIS a/k/a DARREN CURTIS a/k/a DARREN DODD	CRIMINAL NO. S-91-0334 (Distribution of Cocaine, 21 U.S.C. §841(a)(1); Possession of a Firearm by a Convicted Felon, 18 U.S.C. §922(g)(1); Possession of a Firearm in Connection With Drug Trafficking, 18 U.S.C. §924(c)(1).

INDICTMENT

The Grand Jury for the District of Maryland charges:

On or about July 1, 1991 in the State and District of Maryland:

DARREN J. CUSTIS
a/k/a DARREN CURTIS
a/k/a DARREN DODD

the defendant herein, did knowingly and intentionally possess with the intent to distribute a quantity of a mixture or substance containing a detectable amount of cocaine, a Schedule II Controlled Substance.

21 U.S.C. §841(a)(1)

COUNT II

The Grand Jury further charges that on or about July 1, 1991, in the State and District of Maryland,

DARREN J. CUSTIS
a/k/a DARREN CURTIS
a/k/a DARREN DODD

the defendant herein, did knowingly and intentionally use and carry a firearm, that is one .38 caliber Smith & Wesson revolver, a serial nuraber ANE1954, during and in relation to a drug trafficking crime, that is, possession with intent to distribute cocaine, a Schedule II Controlled Substance.

18 U.S.C. §924(c)

COUNT III

The Grand Jury further charges that on or about July 1, 1991, in the State and District of Maryland

DARREN CUSTIS
a/k/a DARREN CURTIS
a/k/a DARREN DODD

the defendant herein, having previously been convicted in a court of a crime punishable by imprisonment for a term exceeding one year, burglary and robbery, did knowingly and unlawfully possess a firearm, that is, one .38 caliber Smith & Wesson revolver, serial number ANE1954, in or affecting commerce.

18 U.S.C. §922(g)(1)

Richard D. Bennett
United States Attorney

A TRUE BILL:

Foreperson

Date

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CRIMINAL NO. S-91-0334R

(Three Prior Violent Felony
or Serious Drug Convictions
Under Penalty Provisions of
18 U.S.C. § 924(e))

(Caption omitted in printing)

NOTICE/INFORMATION OF ENHANCED PENALTY

The United States Attorney for the District of Maryland charges:

1. On September 11, 1991, the Grant Jury for the District of Maryland returned a three-count indictment against the defendant, DARREN J. CUSTIS, a/k/a DARREN CURTIS, a/k/a DARREN DODD, charging him *inter alia* with the offense of possession of a firearm by a convicted felon, in violation of 18 U.S.C. Section 922(g)(1).

2. Prior to the return of the indictment, the defendant, DARREN J. CUSTIS, a/k/a DARREN CURTIS, a/k/a DARREN DODD, previously had been convicted of three separate violent felonies or serious drug offenses as set forth in 18 U.S.C. Section 924(e)(2)(B) and (C):

a. On or about December 11, 1985, the defendant was convicted of burglary in the Circuit Court for Baltimore City (Case No. 28506744) and received a sentence of eight years.

b. On or about October 17, 1989, the defendant was convicted of attempted burglary in the Circuit Court for Baltimore County (Case No. 86CR6828) and received a sentence of two years.

c. On or about June 10, 1985, the defendant was convicted of robbery in the court of Common Pleas of Adams County, Pennsylvania (Case No. CC-52-83) and received a sentence of not less than 22 months and not more than 44 months imprisonment.

3. As a result of three prior convictions described in paragraph 2 above, the defendant, DARREN J. CURTIS [sic], a/k/a DARREN CURTIS, a/k/a DARREN DODD, is subject to the enhanced punishment provisions of 18 U.S.C. Section 924 (e) and can be fined not more than $250,000.00, and shall be imprisoned not less than 15 years and, further, the Court shall not suspend any portion of said sentence nor shall the defendant be eligible for parole with respect to the sentence imposed herein.

18 U.S.C. § 924(e)

/s/ Richard D. Bennett
Richard D. Bennett
United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

(Caption Omitted In Printing)

CRIMINAL NO. S-91-0334-R
(Distribution of Cocaine, 21 U.S.C. §841(a)(1); Possession of a Firearm by a Convicted Felon, 18 U.S.C. §922(g)(1); Possession of a Firearm in Connection With Drug Trafficking, 18 U.S.C. §§ 924(c)(1)

INDICTMENT

The Grand Jury for the District of Maryland charges:

On or about July 1, 1991 in the State and District of Maryland:

DARREN J. CUSTIS

the defendant herein, did knowingly and intentionally possess with the intent to distribute a quantity of a mixture or substance containing a detectable amount of cocaine, a Schedule II Controlled Substance.

21 U.S.C. §841(a)(1)

COUNT II

The Grand Jury further charges that on or about July 1, 1991, in the State and District of Maryland,

DARREN J. CUSTIS

the defendant herein, did knowingly and intentionally use and carry a firearm, that is one .38 caliber Smith &

Wesson revolver, serial number ANE1954, during and in relation to a drug trafficking crime, that is, possession with intent to distribute cocaine, a Schedule II Controlled Substance.

18 U.S.C. §924(c)

COUNT III

The Grand Jury further charges that on or about July 1, 1991, in the State and District of Maryland

DARREN CUSTIS

the defendant herein, having previously been convicted in a court of a crime punishable by imprisonment for a term exceeding one year, did knowingly and unlawfully possess a firearm, that is, one .38 caliber Smith & Wesson revolver, serial number ANE1954, in or affecting commerce.

18 U.S.C. §922(g)(1)

/s/ Richard D. Bennett
Richard D. Bennett
United States Attorney

A TRUE BILL:

/s/ Adrian Redd
Foreperson

/s/ September 11, 1991
Date

IN THE CIRCUIT COURT FOR BALTIMORE CITY,
MARYLAND
CRIMINAL DIVISION

STATE OF MARYLAND

VS. Case No. 28506744

DARRELL [sic] CUSTIS

_____/

REPORTER'S OFFICIAL TRANSCRIPT
OF PROCEEDINGS

Baltimore, Maryland
December 11, 1985

BEFORE:

HONORABLE MABEL H. HUBBARD, Judge

[2] PROCEEDINGS

MR. HONICK: Good morning, Your Honor.

THE COURT: Good morning.

MR. HONICK: For the record, Gary Honick, Assistant State's Attorney. I am here in the matter of State v. Darren Custis who is charged in Criminal Information 28506744, burglary, and warrant 48514716 through 21 with theft over three hundred, possession of a short barrel shotgun, and possession of a handgun.

THE COURT: Counsel for the defendant, you are –

MR. GASTON: Audrey Gaston.

MR. HONICK: Your Honor, my understanding is this defendant is in the Baltimore City Jail at this time.

MS. GASTON: No, he is here.

THE CLERK: He is on his way.

MS. GASTON: He is on his way up to the courtroom, Your Honor.

THE COURT: Oh, I understand. Is there anything we can do without him? What's the possibility of a plea?

MR. HONICK: Your Honor, first of all, if the defendant, once he arrives, is willing to plead guilty, we could call the first count which is burglary, Criminal Information 23506744. As far as the warrant cases are [3] concerned, we would be calling the theft over $300 and possession of a short barrel shotgun. The sentencing guidelines range has been affected by the fact we just discovered that one of the offenses, the one capitulating his prior criminal record, is actually a juvenile offense so his adult criminal record is changed from a major record to a minor record. So, instead of the range being from 12 to 20 years, it becomes two to eight years for the burglary alone. I am not counting what the effect of the theft over $300 and the short barrel shotgun would have on that. But this particular range seems to be acceptable to the defense without the defendant.

THE COURT: Excuse me?

MR. HONICK: This range of two to eight years for the burglary alone.

THE COURT: Is accapetable [sic] to the defendant?

MR. HONICK: Yes.

THE COURT: Is it acceptable to the State?

MR. HONICK: Well, I can present no reason that the range should exceed it. So, yes, it would be acceptable to the State as well.

THE COURT: What is the range for the other?

MR. HONICK: I have not worked it up. I just discovered it.

MS. GASTON: I thought we were working on both [4] of them at the same time.

THE COURT: All right. We have an overall range of two to eight under the matrix. For the theft over $300 is two to five. For the handgun violation is two. For the burglary is two to eight. I say handgun. What should you call it? Short barrel shotgun?

Mr. H: Short barrel shotgun.

THE COURT: Which would be two to five. You are not calling the handgun?

MR. HONICK: No.

THE COURT: As to the theft, handgun, or theft of a short barrel shotgun, they are the same incident?

MS. GASTON: Yes.

THE COURT: They are different, however, from the burglary?

MR. HONICK: That's correct.

THE COURT: Separate incident. Ms. Gaston, overall range, four to 13 years as overall range. Two to five for the theft, two to five for the short barrel shotgun, and two to eight for the burglary. Ovevall [sic] range, four to thirteen.

MS. GASTON: May it please the Court, I have had an opportunity to speak with my client and also the State's Attorney, and he would be willing to plead to two to eight burglary and two to five as to the theft, Alford [5] plea. I have spoken to the State's Attorney who agreed, I believe, to drop the possession charge. Is that correct?

THE COURT: Wait a minute. I understand that you are going forward on the theft and the burglary. Is that what you are saying?

MR. HONICK: That's right. I would be willing under these terms to not proceed on either the handgun violation or the possession of a short barrel shotgun but instead to proceed only with theft of the car and the burglary charge.

THE COURT: And what is the State asking?

MR. HONICK: Your Honor, we're asking for the maximum time on the matrix.

THE COURT: Maximum under the matrix?

MR. HONICK: Yes.

THE COURT: That means eight years for the burglary and five years for the theft; is that correct?

MR. HONICK: Yes.

THE COURT: All right. Are you asking for consecutive sentences?

MR. HONICK: Yes, Your Honor.

THE COURT: All right. Defense has leave to argue for less?

MR. HONICK: Yes. And we also understand that the plea to the theft, not the burglary, the plea to the [6] theft only would be an Alford plea. And the State has no objection to that.

THE COURT: All right. As to the burglary, there is a guilty plea; is that correct, or not?

MS. GASTON: Yes, Your Honor.

THE COURT: All right. The Court finds that acceptable.

MR. HONICK: Your Honor, it would be Criminal Information 28504744, the first count which charges burglary, and Warrant Number 48514716 which charges theft.

THE COURT: All right. Young man, I am going to ask you to stand, come over to the witness stand, raise your right hand and be sworn.

Thereupon,

DARREN CUSTIS

having been called as a witness and having been first duly sworn by the Deputy Clerk, was examined, and testified as follows:

THE CLERK: Speak into the mic. [sic] State your name and your last home address for the record, please.

THE DEFENDANT: Darren Custis, 3706 Fernhill Avenue.

THE COURT: Ms. Gaston, would you qualify your client, please?

MS. GASTON: Mr. Custis, you understand the [7] nature of the offense that you have been charged with?

THE DEFENDANT: Yes.

MS. GASTON: You are competent and understand fully that you are pleading guilty and waiving your right to a full trial in the burglary proceeding?

THE DEFENDANT: Under what?

MS. GASTON: Do you understand fully that you have a right to a trial before a jury in the burglary case and that you are thereby waiving it by entering your guilty plea?

THE DEFENDANT: Yes.

MS. GASTON: Do you do this voluntarily?

THE DEFENDANT: Yes.

MS. GASTON: Have you been advised by counsel?

THE DEFENDANT: Yes.

MS. GASTON: Do you feel satisfied as to your explanation? If you don't –

THE DEFENDANT: Yes – well, as far as right now, I don't fully understand everything that's going on as far as –

THE COURT: Let me go over it for you. You have been charged with the burglary of a dwelling, that is, breaking and entering of a dewlling [sic] in the night time without the permission of the owner and with the attempt to steal, take, and carry away the owner's propety [sic] or with [8] the intent to commit a felony. That's what burglary is. Do you understand that?

THE DEFENDANT: I understand that.

THE COURT: And you have been charged with that burglary. Who is the alleged victim, Mr. Honick?

MR. HONICK: Leon Troop, Your Honor. He is seated in court.

THE COURT: His address?

MR. HONICK: 3818 Fernhill Avenue.

THE COURT: That's the address of the person whom you are accused to having committed a burglary. Do youunderstand [sic] that, sir?

THE DEFENDANT: Yes.

THE COURT: Mr. Honick, please, the owner of the property he is alleged to have stolen as to the theft, sir?

MR. HONICK: Jerome Floyd, Your Honor.

THE COURT: What is he alleged to have stolen from Jerome Floyd?

MR. HONICK: A 1979 Datsun 280Z.

THE COURT: '79 Datsun 280Z?

MR. HONICK: Yes. That's not correct?

MS. GASTON: Is this in the burglary case? Your Honor, I thought we were speaking of the burglary.

THE COURT: Well, we're going to qualify him [9] with the guilty plea as to both.

MS. GASTON: All right. Fine.

THE COURT: One is the Alford plea and the other is a guilty plea. What we want to do is move along. The burglary is alleged to have occurred at 3918 Fernhill Avenue?

MS. GASTON: Correct.

THE COURT: The theft is alleged to have occurred from a one Jerome Floyd and the object of that theft was a '79 Datsun 280Z. Is that correct?

MS. GASTON: That's correct, Your Honor.

THE COURT: The maximum penalty for that grand theft, Mr. Honick?

MR. HONICK: Fifteen years.

THE COURT: The maximum penalty for burglary begin 20 years; is that correct?

MR. HONICK: That's correct.

THE COURT: Plus possible fines.

MR. HONICK: That's correct.

THE COURT: Do you understand that, young man?

THE DEFENDANT: Yes.

THE COURT: And you are pleading gulty [sic] to both. As to the burglary, you are saying, I did that. As to the theft of the 280Z, you are saying, I am not admitting that I did it but I am acknowledging the State has enough [10] evidence to probably result in a guilty finding. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Based on the State's evidence, I am willing now to enter this plea not admitting my guilt but hoping to get a lesser sentence than if I had gone to trial.

THE DEFENDANT: I understand.

THE COURT: Do you understand that? All right. First of all, let me ask you how old you are.

THE DEFENDANT: 20.

THE COURT: How fardid [sic] you go to school?

THE DEFENDANT: 11th grade.

THE COURT: Can you read and write?

THE DEFENDANT: Yes.

THE COURT: I ask you have you ever been under the care of a psychiatrist or a patient in a mental institution?

THE DEFENDANT: I have been under the care of a psychiatrist.

THE COURT: When was that?

THE DEFENDANT: '81 or '82.

THE COURT: Was that a private psychiatrist or was that at a –

THE DEFENDANT: Sinai Hospital.

[11] THE COURT: All right. Do you know the nature of your ailment?

THE DEFENDANT: No. It is nothing the matter with me.

THE COURT: Well, when you went to the psychiatrist, what was your ailment if you know?

THE DEFENDANT: Well, it was requested by the State that I see psychiatrist to make sure I was okay.

THE COURT: Well, how long did you see the psychiatrist?

THE DEFENDANT: About two months.

THE COURT: All right. Let me ask you now. Do you have any difficulty understanding the proceedings today?

THE DEFENDANT: No.

THE COURT: You know exactly what is going on?

THE DEFENDANT: As far as you have explained it.

THE COURT: Now, do you know that you are in court and you know you are pleading guilty and you know you are entering Alford plea; is that right?

THE DEFENDANT: Yes.

THE COURT: Let me explain to you, sir, when you enter a guilty plea, you give up certain constitutional rights. The first right you give up is a [12] right to be tried by the Court or by a jury. If the Court were to try you, I would make the decision as to the facts, I or another judge. If I found you guilty, then I would have to find you guilty by a standard of beyond a reasonable doubt and to a moral certainty. The State would present its witnesses. Ms. Gaston on your behalf would have a right to cross-examine those witnesses. It is called confrontation. And she could ask the questions of the State's witnesses to make sure they were telling the truth, had their stories straight. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: If you had trial by a jury or court, you would have a chance to call witnesses yourself and if you were not able to call those witnesses, we would have what's called compulsory process and you could ask the Court to summons those witnesses for you who could testify on your behalf and say Darren Custis didn't do that. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: If you had a trial by a court or jury, you would have an opportunity to testify in your own behalf, take the stand and tell your story. If you chose to testify in your own behalf, the State's Attorney

or the Court could inquire into your criminal background since [13] you were 18 years old when you were represented by an attorney as to the crimes of what we call moral turpitude. That's crimes that show bad character, fraud, theft, perjury, that sort of thing. The only reason for that question is to help the Court or the jury decide whether to believe you as a witness based on the kind of things you've done in the past. Do you understnad [sic] that?

THE DEFENDANT: Yes.

THE COURT: If you had a trial, you would have a right to remain silent and if it were the Court, the Court would understand your right to remain silent with no inference of guilty from your silence, the court couldn't say, he must be trying to hide something becuase [sic] he doesn't want to testify. It couldn't do that. Instead it could simply decide the case based on all the other evidence present and any arguments presented by the State's Attorney and your counsel. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: If you had a jury trial, the Court would instruct the jury to make no inference whatever from the fact that he exercised his constitutional right to remain silent. All right?

THE DEFENDANT: Yes.

THE COURT: Now, as I have said, you have a [14] right to the Court trial and you have a right to a jury trial in which 12 men and women would be chosen from the voter's registration rolls of Baltimore City by the

State's Attorney, by Ms. Gaston with your help, and those 12 men and women could be young and old, black and white Oriental, Native American, they may be a cross section of the community. And they also would have to decide your guilt by a standard of beyond a reasonable doubt and to a moral certianty [sic]. And their decision would have to be unanimous. That is, every single one of them would have to say you are guilty before you could be convicted or every single one of them would have to sy [sic] you wre [sic] innocent before you could be acquitted. And anything in between is called a hung jury. The judge declares a mistrial. But at that point the State's Attorney has an option. He could retry on you on the case or he could dismiss the case against you. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: If you plead guilty, you are giving up both a court trial and a jury trial. Do you undestand [sic] it?

THE DEFENDANT: Yes.

THE COURT: What you are saying is it is accpetable [sic] for the State to read into the record the facts and you are agreeing as the burglary that those are the [15] facts. That's exactly what happened. As to the Alford plea, the theft, you are saying, well, I don't agree that's what happened but I agree that if the State's witnesses were called, that's what they would testify to. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: I will have a chance to make some minor additions, deletions, or corrections, but you would not have a chance to present anywitnesses [sic] or to testify in your own defense. You are agreeing that's all the evidence the Court is going to get before deciding whether or not you are guilty. And the probability is that the State's statement of facts will be sufficient to find you guilty of both charges. Is that clear to you?

THE DEFENDANT: Yes.

THE COURT: All right. Now, young man, I ask you whether you have had any drugs, alcohol, medication in the past 24 to 48 hours that might cloud your thinking today.

THE DEFENDANT: No.

THE COURT: You know exactly where you are and what you are doing?

THE DEFENDANT: Yes.

THE COURT: Has anybody forced you or threatened you orany [sic] member of your family or made an [16] promises to you aside from the plea agreement in order to make you undertake these pleadings?

THE DEFENDANT: No. Well, I didn't understand as far as the plea agreement, as far as what they were saying two to five, two to eight. I don't understand that.

THE COURT: What that means was under the sentencing guidelines, you should receive no more than two years and no more than five years for the theft if you are found guilty.

THE DEFENDANT: Yes.

THE COURT: And under the sentencing guidelines which most judges in this state are trying to follow, you shouldn't be sentenced to any less than two years or any more than eight years for the burglary, even though the maximum sentence for burglary in the lawbook, in the statute is 20 years. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: And that sentencing guildine [sic] is an individual guideline. It is only ours. It is not anybody else's. And it is based on all of your background, your age, the number of crimes you may or may not have committed in the past. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: When we add it all together, we [17] come out with certain numbers and those numbers are a minimum of two, maximum of eight, for burglary, minimum of two, a maximum of five for theft. That's what that means.

THE DEFENDANT: All right.

THE COURT: Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Do you understand the maximum for burglary is 20 years, the maximum for theft is 15 years, and if you went to trial and you were found gulty [sic], the judge could give you 35 years? Is that clear to you?

THE DEFENDANT: I understand.

THE COURT: All right. If you plead not guilty, even if you are found guilty, you have an absolute right to appeal to the Court of Special Appeals. But if you plead guilty, you limit your right to appeal. And that you are left not with an automatic appeal but a right to petition the Court for leave to appeal. And they can say no. And if you petition the Court of Special Appeals for leave to appeal, when you can onnly [sic] petition on four grounds. The first ground is that your plea was not voluntarily given, not given knowingly, intelligently, and voluntarily. And that is the reason that am asking you all these questions, to make sure that you are doing this voluntarily, of you own free will, and that you understand what you are doing by entering this plea. Now, [18] I ask you, sir, is this plea voluntarily given?

THE DEFENDANT: Yes.

THE COURT: No one forced you to give it?

THE DEFENDANT: No.

THE COURT: You are in your right mind right now and you know what you are doing; is that right?

THE DEFENDANT: Yes.

THE COURT: The second ground for appeal is that the Court gave you an illegal sentence. Now, I have told you that the Court can give you 35 years and I guarantee you that I am not going ti [sic] give you 35 years. So, anything less than 35 years is not an illegal sentence. I have agreed that I am not going to give you more than eight years for the burglary or more than five years for the theft. Do you understand that?

THE DEFENDANT: (Nods head affirmatively)

THE COURT: So, if you appeal on the voluntariness of your plea or appeal on the illegality of your sentence, you wouldn't win your appeal. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: The third area under which you can appeal is the jurisdiction of the Court. I have the jurisdiction to hear any case that arose in Baltimore City and that was perpetrated by a person who was 18 years old [19] or older. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: So, you wouldn't win on that ground either. Is that clear to you?

THE DEFENDANT: Yes.

THE COURT: The last ground on which you can appeal is the competence of your counsel, that is, Ms. Gaston. So, I ask you now, sir, are you satisfied with the services that Ms. Gaston has give you?

THE DEFENDANT: Yes.

THE COURT: All right. Has she confererd [sic] with you on several occasions, talked with you?

THE DEFENDANT: Yes.

THE COURT: Has she given you certain advice as to whether or not to plead guilty, whether or not to accept the agreement? Has she given you that advice?

THE DEFENDANT: Somewhat.

THE COURT: Has she told you in the past the pssible [sic] defense you might have in this case?

THE DEFENDANT: No.

THE COURT: She has not told you what defenses you might have had or that you didn't have any?

THE DEFENDANT: No.

THE COURT: Has she discussed the case with you?

[20] THE DEFENDANT: Yes, somewhat but it's been confusing.

THE COURT: What's been confusing?

THE DEFENDANT: The whole thing really has been confusing.

THE COURT: Do you have any family member here?

THE DEFENDANT: Yes.

THE COURT: Have the family members talked with your attorney?

THE DEFENDANT: yes.

THE COURT: All right. And you had another attorney before Ms. Gaston; is that right?

THE DEFENDANT: Yes, I did.

THE COURT: When did you secure the services of Ms. Gaston?

THE DEFENDANT: A while ago.

THE COURT: Well, I don't known what a while ago is.

THE CLERK: Your Honor, the file indicates that the appearance of Edwin Smith, Jr. was stricken on June 14 of '85 befeore [sic] Judge Johnson.

THE COURT: Does it say when Ms. Gaston entered her appearance?

MS. GASTON: I was in court on that date, I believe.

[21] THE CLERK: June 14th?

MS. GASTON: No, I am sorry, before Judge Johnson on a forfeiture hearing.

THE CLERK: On September 9, 1985, the bail forfeiture was stricken and the defendant was remanded to the Baltimore City Jail in lieu of no bail status. Is that the day you were before ~~Judge~~ Johnson?

MS. GASTON: Yes. And now the defendant has been incarcerated in Adams County, Pennsylvania, Your Honor, and has just been back in Baltmore [sic] City since –

THE CLERK: October 19th.

THE COURT: All right. I have to ask you whether or not you are satisfied with the services of your attorney.

THE DEFENDANT: Yes.

THE COURT: Has your attorney done the things youv'e [sic] asked her to do?

THE DEFENDANT: Yes.

THE COURT: And are you satisfied that she understands the law and has applied the law in this case on your behalf?

THE DEFENDANT: Yes.

THE COURT: So having said that, the propbability [sic] is you would not be able to win if you appealed on the competency of your counsel. Do you [22] understand that?

THE DEFENDANT: Yes.

THE COURT: Sir, are there any questions you want the [sic] ask the court about this plea?

THE DEFENDANT: Well, if it is possible, could I speak with my attorney for maybe a mintue [sic] or two before I make the plea?

THE COURT: All right. Step down.

All right. You have had a chance to confer again with Ms. Gaston; is that right?

THE DEFENDANT: Yes.

THE COURT: Sir, I ask whether or not it is still your intention to plead guilty.

THE DEFENDANT: Yes.

THE COURT: As to the burglary charge, you enter an Alford plea as to the theft charge; is that right?

THE DEFENDANT: Yes.

THE COURT: I ask you as the burglary charge, sir, are you entering the guilty plea becuase [sic] you are in fact guilty?

THE DEFENDANT: Yes.

THE COURT: As to the theft charge, are you entering the guilty plea on your Alford because you

believe the State has enough evidence which if produced [23] would result in a finding of guilty?

THE DEFENDANT: Yes.

THE COURT: I ask you to step down, sir. The Court is satisfied with the qualifications as to each charge. Mr. Honick?

MR. HONICK: Your Honor, I first would cite the statement of facts with reference to the burglary charge. That would be as follows: That on January 15, 1985, Leon Truitt and family lived at 3918 Fernhill Avenue which was located in the City of Baltimore. At about 6:30 p.m. on that date, after it was dark outside, Renee Truitt who is Mr. Truitt's daughter who lives at that address was in ehr [sic] second floor bedroom talking on the telephone when she heard the sound of shattering glass on the first floor. She tiptoed downstairs, so to speak, to see what was going on and saw someone who she would today identify as the defendant seated at trial table to the left of counsel running from the first floor center hallway, open the front door, and run outsisde [sic] the house. She would testify that she was positive that it was the defendant because not only did she get a good look at him but she has basically known the defendant since they were little children. So, her identification was positive. She, in that is, Miss Truitt was able to observe that the front sliding glass door in the home had been broken and that there was [24] glass from those windows all over the floor of the house. She then called the police.

Officer Burkhardt of the Baltimore City Police Department, Northwestern District, responded to this call. He came, made an investiation [sic] and found, first

of all, a six-inch by twelve-inch cinderblock chunk near the broken glass. That was apparently what was used to break the glass to the sliding doors. And by consulting with Mr.. Leon Truitt, who is the owner of the house, owner of its contents, was able to determine that various prooperty [sic] had been taken, in particular, seven Ivory Oriental statutes [sic] which had an accummulative [sic] value of $2,000.

THE COURT: Seven Oriental statutes.

MR. HONICK: Ivory Oriental statutes [sic] which had a total value of $2,000. Now, othermembers [sic] of the Truitt family, well, another member of the Truitt family, Lyles Truitt is another son of Leon Truitt. His girlfriend, Sheila Grandison, and their friend, Robert Lee and Robert Johnson, happened to be coming up the street in their car when the defendant came out of the house and randown [sic] the street, and they also had known the defendant for many years. They were also able to get a look at him when they came out the house and positively identify him. Everyone would testify that the defendant had no permission to be in the house at the time and they had no reason to believe [25] he would go in. They had no knowledge of his, had not given him permission and had no reason to know why he did this.

Officer Burkhardt, continuing her investigation, found a car at the 3800 block of Fernhill Avenue, a 1988 stationwagon with Maryland license plates, ELE44 which was registered to one Erlene Dawn of 3706 Fernhill Avenue. This is the mother of the defendant. And this particular station wagon, when inspected, was found to contain

both of the antique Ivory statutes [sic] that were taken from the house.

Mrs. Dawn reported to Officer Burkhardt that her son, the defendant, had a set of keys to the car but was not permitted to use the car. I should say that all the antique statues except for one which was valued at $200, were recovered and one is still missing and that the damage to the sliding glass doors amunted [sic] to approximately $700 worth. That would be the statement of facts as to the burglary.

THE COURT: All right. What if any changes to that statement of facts, Ms. Gaston?

MS. GASTON: Just, in application, I would like to state for the record that while the defendant had been drinking and did admit he didn't know what he was doing, that these were friends, that the defendant did turn [26] himself in to the police authorities. And while he has admitted going into the victim's home without permission, that they were friends of the defendant and that his motive, if he had testified, would have been that he did so through motivation to recover money for a debt, not only by the son who was his friend but also a debt owed to him by the father, Mr. Truitt.

I would like to further state that it does not appear that the damage to the glass door was not covered by insurance.

THE COURT: All right. The second statement of facts, Mr. Honick?

MR. HONICK: Yes, this would be as follows: On April 22, 1985, Mr. Jerome Floyd reported that his –

THE COURT: Jerome Floyd?

MR. HONICK: Yes, He reported that his 1979 Datsun 230Z was stolen from the 3200 block of Brightwood Avenue in Baltimore City. On April 24, 1985 at about 11:35 p.m., Miss Adrian Hankins who is the brother in law of Mr. Floyd –

THE COURT: I thought you said Miss.

MR. HONICK: It is not one of my days.

THE COURT: But it is a lady or a man?

MR. HONICK: As you can see, it is a –

THE COURT: Oh, all right. Thank you, ma'am, [27] A-d-r-i-e-n-n-e.

MR. HONICK: A-d-r-i-a-n.

THE COURT: All right.

MR. HONICK: Sorry about that, your Honor. At any rate, she observed the car, she recognized the car she saw at the 4000 block of Liberty Heights Avenue in Baltimore City. She saw two people dirving. [sic] She would identify the defendant seated at trial table.

THE COURT: She saw two people driving?

MR. HONICK: Well, one person driving.

THE COURT: All right. two people in the car.

MR. HONICK: She would identify the defendnat [sic] seated at the trial table as the passenger in the front seat. The car pulled up to the curb of the 2700 block of Gwynn Oak Avenue near Liberty Heights Avenue and the two occupants, the defendant being the

passenger and the other person driving, got out of the car and went into a sub shop.

THE COURT: I am sorry. I didn't hear what you said last.

MR. HONICK: The two people got out of the car and went into a sub shop at Liberty Heights Avenue. Miss Hankins notified the police and Officer Terry Murray of the Baltimore City Police Department, Northwestern District, came, detained the two people who got out of the [28] car, the defendant being one of these people, and placed them under arrest.

The car when inspected was found to have a opped [sic] ignition, was found to have been extremely altered from the way it was when taken two days earlier. Not only was the ignition itself popped out, hubcaps were missing, lights were either burned out or broken, it was in no condition to run at the time. It was a screw driver lying on the floor of the interior of the car and the car had to be towed away. Mr. Floyd is present in court today with bills that he had to incur as a result of this to rehabiitate [sic] the car to its status quo before this incident occurred and his total expenses which have been reimbursed by insurance were $1800.

THE COURT: And you say they were covered or not?

MR. HONICK: They were covered. However, he would testify, if the case went to trial, that there was a tool set worth approximately $150 that was in the car and was missing when he got the car back. All these incidents

occurred in Baltimore City and that would be the statement of facts in reference to the theft charge.

THE COURT: Was that out of pocket loss of $150?

MR. HONICK: Yes.

[29] THE COURT: All right. Anything further?

MR. HONICK: No, your Honor.

THE COURT: What if any changes, Ms. Gaston?

MS. GASTON: Your Honor, the only application that I would like to make or requests for changes would be that the question of the witness' ability to identify both the driver and the passenger while driving down the street and the charges themselves given do not make it clear at all, nor do they make it clear that she saw the defendant exit from the vehicle in question and enter the restaurant, only that there were two, that the car was parked by thhe [sic] restaurant, I believe, and that there were two males in dark clothing inside.

THE COURT: That's not the statement of facts I heard, Ms. Gaston. The statement of facts I heard indicated, and I write myself notes, that Miss Adrian Hankins, sister of the owner of the car, saw the car in the 4600 block of Liberty Heights Avenue with two persons, that the defendant was a passenger in that vehicle, that the car pulled to the curb and around the 46 or 4700 block of Liberty Heights Avenue, that the two, that is, the driver and the defendant, got out, went into a sub shop, and Miss Floyd called the police and the police came and arrested both of these people. That was my understanding of the statement of facts. Did I miss something?

[30] MS. GASTON: I would stand corrected, Your honor, but I belive [sic] that at the time of arrest, I believe it was stated that the defenadnt [sic] here was supposed to have been the driver and the other one the passenger.

THE COURT: Well, that wasn't what I heard in the statement of facts. Is that your statement of facts, Mr. Honick?

MR. HONICK: Yes, Your Honor.

THE COURT: All right. Is there anything further, Ms. Gaston?

MS. GASTON: Nothing other than that, as the defendant has stated, he has not and was not the individual who was in the car at that time nor was he the individual in the reastaurant [sic] who was apprehended and arrested and charged for the alelged, [sic] that he did not commit the crime as alleged. Now, he does not feel he has an adequate defense.

THE COURT: All right. Mr. Custis, you understand albeit it is an Alford plea, it is equivalent to a guilty plea. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: And you understand that the same restriction on your right to appeal, that same limitation concerns this plea as the guilty plea. Do you understand?

THE DEFENDANT: I understand.

[31] THE COURT: All right. The Court enters the Alford plea. Could you stand, please? The Court has

accpeted [sic] the guilty plea and the Alford plea. Having accepted both, the Court enters a guilty verdict as to each and both the charges, those verdicts, we believe, being absolutely supported by the statement of facts as to each of the cases. Would you like to be heard in mitigation, Ms. Gaston?

MS. GASTON: Yes, I would, Your Honor.

THE COURT: Go ahead.

MS. GASTON: Your Honor, the defendant is 20 years of age. Since the age of 16, has been incarcerated, and I would ask this court to consider giving him a minimum sentence on both counts to run concurrently with the 44 months that he is now serving at Adams County Prison in Pennsylvania for the following reasons: Certainly, the defendant has shownsome [sic] rehabilitation and that he did cooperate with both the Baltimore County and the Baltimore City authorities in resolving a nmber [sic] of burglaries that had been open. Subsequent to his serving of time in Baltimore County, he was then returned to Pennsylvania for the charges alleged there. They were all committed by the same ring.

Mr. Custis is an individual who, I believe, needs a chance in society to come out. And as soon as [32] possible, after serving his debt to society, have the opportunity to try to fully rehabilitate his life and live a life of freedom and a productive life. Certainly, his family has attempted to stand behind him. I believe that his willingness to sign the detainers, to come down to be heard, to resolve these matters in the most expedient manner possible before this Court indicate his desire to get on with his life at some point.

While the crimes committed are grave, certainly, the mitigating circumstances that were set forth as to the burglary, I would ask the Court to consider and certainly contrary to the request of the prosecution, enter a minmum [sic] number of years to be served and that they be served concurrently.

THE COURT: Very well. Young man, you have what's called the right of alloucation [sic]. It means albeit Ms. Gaston can speak for you, you have the right to speak for yourself before the judge determines sentence. You don't have to speak but if you want to, now is the time. Is there anything you want to say?

THE DEFENDANT: Yes, Your Honor, I can lvie [sic] with, as far as the burglary, but I am not sure exactly what happened on the night of the burglary. I had been drinking. But on the night that I was arrested for that auto theft, I did not steal that car. Now, the only [33] reason –

THE COURT: Young man, we've been through all that, haven't we? I didn't ask you to stand up and protest your innocence because you have a right to trial by court or by jury to protest your innocence.

THE DEFENDANT: I understand.

THE COURT: Your choice was to go forward on an Alford plea. I don't know if I can explain it any better to you. I was confident that you understood it. So, now, this is not the time for you to protest your innocence. Time now is for you to talk tome [sic] and tell me why I shouldn't give you five years for the theft. Do you understand?

THE DEFENDANT: Well, all I can say is I didn't steal the car.

THE COURT: You want?

THE DEFENDANT: I know I have a long time to sit and wait and think, which I have been doing. It's not really too much I can say. All right?

THE COURT: Does the State wish to be heard. I am sorry. I didn't mean to cut you off. Is there anything else you wanted to say?

THE DEFENDANT: That's it.

THE COURT: Does the State wish to be heard?

MR. HONICK: Your Honor, this defendant has [34] gone through the entire juvenile system having been committed to the Juvenile Services institutions and escaped from Juvenile Services institutions for which he was convicted. And now here we are again not only with property crimes in the state of Maryland but a property crime in Pennsylvania which is similar to the ones that took place in Baltimore. Obviously, wer [sit] not dealing with the crime in Pennsylvania except to the extent that it demonstrates something about this person's general attitude towards other people's property and the rights of others. I reject and I urge the Court to reject the argument that he is a poor, innocent person who happened to have been drunk at the time of the burglary so he has no memory of what happened, because what happened, as the statement of facts demonstrates, what happened was very carefully carried out, breaking and entering and carrying away of several, not just one but several

antiques and then deposited in a very calculated way in a hiding place.

This is not the behavior of somebody who is so drunk he doesn't know what he is doing. This is somebody who knew what he was doing and has a record of doing these kinds of things and should be dealt with appropriately. What's appropriately? Appropriately, in the State's view, is that having beengiven [sic] the maximum, I use the word advisedly, benefit of the Juvenile rehabilitation system [35] and having utterly rejected them, not only by having haad [sic] to come back repeatedly to the juvenile institutions but also having escaped, having rejected what there wasto [sic] offer there but having escaped therefrom, the time now that he is an adult and now that he has demonstrated a persistence in abusing others and others' property as an adult, I think the time has come to deal harshly with this person. And that's why the State recommends that the Court not exceed the guidelines but rather impose the maximum sentence for him alongthe [sic] guidelines. And that's our position.

THE COURT: Young man, will you stand, please? Do you want to be heard further, Ms. Gaston?

MS. GASTON: Just one point of clarification, Your Honor. The distinction was that one was a theft ring and upon the commission of crime in Pennsylvania, he was retuned to the Maryland Training School for Boys. There was not an individual crime for which he was returned to the Maryland Training School. It was upon his arrest in Pennsylvania. And it was during his time serving or while being detained there that he did escape anddid [sic] get the 90 days served while he was there.

THE COURT: While he was in Pennsylvania?

MS. GASTON: Yes. The crime that was committed in Pennsylvania, they retuned him to Maryland to the [36] training school for. It was not for a separate crime again committed and again I would like to make the distinction between those times committed by the theft ring for which he did testify and cooperate wtih [sic] the State and the present burglary charge which involved a neighbor.

THE COURT: Why is he incarcerated for 44 months?

MS. GASTON: That was .he sentence of the Adams County Court.

THE COURT: What for?

MS. GASTON: On the same charge. It's been two years.

THE COURT: What was the charge?

MS. GASTON: The charge was robbery. He was an accomplice in a robbery and it was for that charge that he was sent back to Maryland.

THE COURT: All right. Young man, stand up. The Court having found you guilty of theft, the sentence is five years to the Division of Correction. The Court having found you guilty of burglary, the sentence is eight years to the Division of Correction, suspend three years, probationary period for three years, 36 months, upon release, supervised. Both sentences are to be concurrent and begins as of October 17, 1985 to run concurrent with the sentence presently served.

[37] You have an absolute right, young man, as I have indicated to you, to file within the next 30 days a motion for leave to appeal to the court of special Apepals [sic] on the grounds of appeal. Within the next 90 days, you may ask for reconsideration by this Court, that is, by way of modification and/or reduction of sentence. You have to do that in writing. Do you understand?

THE DEFENDANT: Yes.

THE COURT: All right. Thank you.

MR. HONICK: Thank you, Your Honor.

(End of proceedings)

IN THE CIRCUIT COURT FOR
BALTIMORE COUNTY, MARYLAND

STATE OF MARYLAND

vs.

CASE NO.
86-CR-6828

DARREN JEFFERY
CUSTIS,

Defendant

_____/

REPORTER'S OFFICIAL TRANSCRIPT
OF PROCEEDINGS
(Trial on the Merits)
VOLUME I of I

Towson, Maryland

October 17, 1989

BEFORE:

HONORABLE WILLIAM R. BUCHANAN, SR., Associate Judge

PAUL G. GRIFFIN
Official Court Reporter
Towson, Maryland 21204

[1-2] PROCEEDINGS

(The Defendant was present.)

MR. JACKSON: We will be proceeding on a not guilty statement of facts on the one charge, which charge is attempted burglary. Should Your Honor find the recitation of facts sufficient to convict the Defendant, the State will make a recommendation of a two year sentence to the Department of Corrections, that sentence being suspended in lieu of a term of probation to be set at the Court's discretion.

MS. PEYTON: That's correct. Jerri Peyton from the Public Defender's Office.

Mr. Custis, you have agreed to proceed in this fashion, pleading not guilty, and proceed on an agreed statement of facts. That means you are waiving your right to a jury trial.

Do you understand that a jury is twelve people chosen from the voter rolls of Baltimore County with your assistance and my help and that of the State's Attorney. Each one must be convinced beyond a reasonable doubt that you are indeed guilty of an attempted breaking and entering.

Do you wish to waive that right?

THE DEFENDANT: Yes.

MS. PEYTON: The State's Attorney will read a statement of charges to the record. You will not be able to cross-examine any witnesses. The State will not present any witnesses. [1-3] You will not present any defense other than any legal argument I might make.

Do you agree to proceed in this fashion?

THE DEFENDANT: Yes.

THE COURT: How long has be been in jail?

MS. PEYTON: Mr. Custis is doing a six and a half year sentence in the State of Pennsylvania right now. He's down here on an interstate detainer.

MR. JACKSON: Your Honor, it is agreed by and between the State of Maryland and the Defendant this is a true statement of facts. On February 4, 1985 at about

1:57 that afternoon, Officer Ciepiela of the Baltimore County Police Department was dispatched to 6831 Alter Street in Baltimore County, Maryland, reference to an attempted breaking and entering that just occurred.

Upon his arrival, he was met by Mr. Gardner who resides at that address in Baltimore County. Mr. Gardner informed the officer at approximately 1:45 p.m. that afternoon he was awakend [sic] by the sound of a rear side window in his house being broken. The window was then kicked out.

He advised there was two subjects involved. After he awoke, and checked it out, those two people saw him, and ran from the outside of the house around to the front of the house.

A neighbor, Mr. Gibbs, who resides at 6820 Alter Street, advised he observed two subjects run to a vehicle parked [1-4] in front of Mr. Gibbs' home. The vehicle left the scene, heading westbound on West Ridge Road toward Liberty Road. Mr. Gibbs described it as an older model Plymouth station wagon, maroon in color, displaying license ESL-542.

The officer ran a listing for that vehicle, and it came back listed to an Earlene, E-a-r-l-e-n-e, Dodd, D-o-d-d, who resides on Fernhill Avenue in Baltimore, Maryland.

On the 6th of February, 1985, the officer went to that address to interview the owner of the vehicle. The owner advised that on that date the car was being used by her son and his friend; her son being, Darren Custis. The description given by Ms. Dodd fit the description given by Mr. Gardner and Mr. Gibbs, the witnesses, of the

person who was attempting to kick out the window at Mr. Garner's house.

The officer on that same day made a record check of the Defendant, and was able to get a photo of the Defendant, and placed it in a photo array, showing the spread with five other look-a-likes to the victim, Mr. Gardner, and Mr. Gibbs.

On the 6th of February, 1985, he went to Mr. Gibbs' residence, and showed the photo spread to Mr. Gibbs. Mr. Gibbs identified the Defendant as being the person who he saw breaking in the window, and fleeing from the scene on that day.

That is the State's case, Your Honor.

MS. PEYTON: No additions or corrections, Your Honor. Make a motion for acquittal, and submit as to that and the [1-5] verdict.

THE COURT: Overruled. On that statement of facts the verdict is guilty.

MS. PEYTON: Your Honor, Mr. Custis is 24 years old. He is single. He does not have any children. He obtained his GED in 1988 while incarcerated at Huntington in Pennsylvania. He is currently serving a six and a half year sentence at the Pennsylvania State Detention Center.

He has apparently been an exemplary prisoner, and he has some certificates and things he would like to show Your Honor, while he has been in Pennsylvania, and is really making an effort to turn his life around.

THE COURT: What is the plea arrangement here on this case?

MS. PEYTON: Two years, suspended all but – well, two years, suspended.

THE COURT: That's it?

MS. PEYTON: Yes.

THE COURT: How much more time does he have to go in Pennsylvania?

THE DEFENDANT: I have served so far two and a half years.

THE COURT: What was that for?

THE DEFENDANT: Robbery and escape.

MS. PEYTON: He has four years to go.

[1-6] THE COURT: I see it's an 85 case. Where has it been?

MS. PEYTON: He has been the guest of Maryland and Pennsylvania for some time at various institutions.

THE COURT: They brought him all the way down here for this case?

MS. PEYTON: Yes, sir.

THE COURT: Two years to the Department of Correction, suspended, that's it. Waive costs.

MR. JACKSON: Is there a term of probation with that?

THE COURT: When am I going to put him on probation? He's got two years more to do. I won't even be here. Waive court costs.

MS. PEYTON: You have ten days from today's date to file a motion for new trial; thirty days within which to file for an appeal; ninety days to ask Judge Buchanan to revise his sentence. I would advise you that probably you do not want to do the latter. Each of these must be done in writing with the Clerk of the Circuit Court of this County. You can do these by contacting the Public Defender's Office for the State of Maryland.

Any questions?

THE DEFENDANT: No.

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	)	NO. S-91-0334 CRIMINAL
VS.	)	
DARREN J. CUSTIS	)	

MARCH 6, 1992

BALTIMORE, MARYLAND

THE ABOVE ENTITLED CASE CAME ON FOR SENTENCING AND MOTION FOR NEW TRIAL BEFORE THE HONORABLE FREDERIC N. SMALKIN AT 9:30 A.M.

[2] PROCEEDINGS

THE COURT: CRIMINAL CASE NUMBER S-91-0334. WE WILL PROCEED AT THIS TIME WITH SENTENCING IN THIS CASE, UNITED STATES VERSUS DARREN CUSTIS.

MR. JOHNSTON, HAVE YOU HAD AN OPPORTUNITY TO READ THE PRE-SENTENCE INVESTIGATION REPORT?

MR. JOHNSTON: YES, I HAVE, YOUR HONOR.

THE COURT: ALL RIGHT. AND HAVE YOU HAD AN OPPORTUNITY TO DISCUSS IT WITH YOUR CLIENT?

MR. JOHNSTON: YES, I HAVE.

THE COURT: MR. CUSTIS, HAVE YOU READ THE PRE-SENTENCE INVESTIGATION REPORT?

THE DEFENDANT: YES, SIR.

THE COURT: AND HAVE YOU DISCUSSED IT WITH YOUR ATTORNEY?

THE DEFENDANT: YES, SIR.

THE COURT: MR. JOHNSTON, IS THERE ANY MATTER OF FACT THAT NEEDS TO BE CLARIFIED FOR THE P.S.I. UNDER RULE 32, ANY DISPUTED FACTUAL ISSUE?

MR. JOHNSTON: NO DISPUTED FACTUAL ISSUES, YOUR HONOR, EXCEPT FOR THE ACCEPTANCE OF RESPONSIBILITY ISSUE, AND I DON'T THINK THAT IS A FACTUAL ISSUE.

THE COURT: NO, IT IS NOT. THAT IS NOT A RULE 32 FACTUAL ISSUE, CERTAINLY. I DON'T THINK IT IS, ANYWAY.

ALL RIGHT. LET'S GO ON, THEN, TO THE –

[3] MR. JOHNSTON: I WOULD ADD, YOUR HONOR, THE ONLY FACTUAL ISSUE I WOULD LIKE TO HAVE A CHANCE TO MAKE A RECORD ON TERMS OF THE ARMED CAREER CRIMINAL ACT APPLICABILITY IS MY CLIENT'S RELIANCE ON A LACK OF INFORMATION GIVEN BY HIS COUNSEL WITH RESPECT TO THE 1985 BURGLARY CONVICTION.

THE COURT: WELL, I'LL TELL YOU WHAT. I THOUGHT ABOUT THAT, AND I DON'T THINK I AM

EVEN GOING TO TAKE ANY EVIDENCE ON THAT, BECAUSE I DON'T WANT TO MAKE ALTERNATIVE FINDINGS. I WANT TO FORCE THE ISSUE IN THE FOURTH CIRCUIT.

MR. JOHNSTON: I THOUGHT THAT WAS THE COURT'S INTENTION.

THE COURT: RIGHT. I REALLY WANT TO FORCE THE ISSUE AND GET A DECISION ON THIS POINT IN THE FOURTH CIRCUIT. IF I AM MISTAKEN ABOUT THE SCOPE OF COLLATERAL REVIEW IN A 924(E), THEN OBVIOUSLY IT WILL OPEN IT UP TO TESTIMONY AND FINDINGS UNDER HOOPER V. GARRAGHTY, 845 F. 2D 471, FOURTH CIRCUIT.

SO, REALLY, WHAT I WILL DO IN ORDER TO – I WILL LISTEN TO ANY ARGUMENT ON IT IN A MINUTE, BUT I REALLY DON'T INTEND TO MAKE ANY FINDINGS ON THAT POINT, BECAUSE I REALLY DO WANT TO FORCE THE ISSUE ONE WAY OR THE OTHER IN THE FOURTH CIRCUIT AND GET SOME CLEAR DECISION FROM THEM ON WHAT TO DO ON THESE TRIGGERLOCK CASES WHERE THERE IS ENHANCEMENT SOUGHT.

MR. JOHNSTON: BUT, FOR THE RECORD, THE COURT IS OVERRULING MY REQUEST TO HAVE A HEARING AND HAVE MY CLIENT TESTIFY ON THAT ISSUE?

[4] THE COURT: YES, ON THE GROUND THAT, AS I HAVE INDICATED IN MY LETTER TO YOU OF MARCH 5, 1992 WITH ENCLOSURES, I BELIEVE THAT THE SCOPE OF COLLATERAL REVIEW IN A

924(E)CASE ON PRIOR CONVICTIONS STANDS ONLY TO WHETHER THERE WAS A GIDEON VIOLATION UNDER THE AUTHORITY I HAVE CITED IN THAT LETTER, WHICH I AM GOING TO INCORPORATE, OF COURSE, IN THE RECORD. I DIRECTED IT TO BE FILED IN THE COURT FILE.

I DON'T KNOW WHETHER IT HAS MADE IT IN YET, RON, OR NOT. DO YOU SHOW A LETTER OF MARCH 5, '92, WHICH WAS JUST SENT UP THERE YESTERDAY?

THE CLERK: I WILL CHECK.

THE COURT: WITH ENCLOSURES.

THE CLERK: IT'S NOT IN THERE YET. I WILL MAKE SURE IT IS IN THERE.

THE COURT: MAKE SURE IT IS IN THERE.

ANYWAY, LET'S PROCEED ON TO THE MATTER OF SENTENCING HERE.

WITH REGARD TO THE QUESTION OF ARMED CAREER CRIMINAL, WHAT POINTS DO YOU WISH TO MAKE IN CONNECTION WITH THE ARMED CAREER CRIMINAL PROVISION, MR. JOHNSTON, FOR THE RECORD?

MR. JOHNSTON: THE GOVERNMENT FILED A NOTICE OF ENHANCEMENT IN THIS CASE RELATED TO THREE PRIOR CONVICTIONS ON THE PART OF MY CLIENT. THERE WERE ONLY THREE THAT WERE NOTIFIED BY THE GOVERNMENT TO BE USED FOR PURPOSES OF ENHANCEMENT UNDER THE ARMED CAREER CRIMINAL ACT.

[5] THE COURT: OF COURSE, THAT'S NOT A STATUTORY NOTICE. THAT'S A COURTESY NOTICE UNDER SECTION 924(E).

MR. JOHNSTON: WELL, I THINK WE HAVE THE RIGHT TO RELY ON THE NOTICE THEY GIVE US IN TERMS OF OUR PREPARATION IN –

THE COURT: DO YOU MEAN IN TERMS OF ESTOPPING THE GOVERNMENT?

MR. JOHNSTON: YES, YOUR HONOR.

THE COURT: WELL, EXCEPT THAT I DON'T KNOW THAT IT IS NECESSARILY – I THINK IT IS UP TO THE COURT TO DETERMINE THE SENTENCE BASED ON ALL THE INFORMATION THAT'S BEFORE IT. IT'S NOT NECESSARILY THE GOVERNMENT'S BURDEN TO BRING IT FORTH.

IN ANY EVENT, GO AHEAD ON. IF YOU WANT TO DISCUSS JUST BASED ON THE THREE THAT WERE NOTICED TO YOU, GO AHEAD AND DO THAT.

MR. JOHNSTON: THANK YOU, YOUR HONOR.

WITH RESPECT TO THE 1985 ROBBERY CONVICTION, WE HAVE ALREADY NOTIFIED BY THE COURT BY ROUND ABOUT WAY, BY LETTER TO THE PROBATION OFFICE, OF OUR OBJECTION TO THAT BEING USED UNDER THE ARMED CAREER CRIMINAL ACT BECAUSE HE WAS CONVICTED AS AN ACCOMPLICE.

WE HAVE NO CONSTITUTIONAL OBJECTIONS TO THAT CONVICTION, ONLY THAT AS AN ACCOMPLICE HE SHOULD BE TREATED DIFFERENTLY THAN

SOMEONE WHO IS CONVICTED AS A PRINCIPAL [6] UNDER THE ARMED CAREER CRIMINAL ACT. I HAVE NO AUTHORITY FOR THAT PROPOSITION. I DON'T KNOW THAT IT HAS EVEN BEEN DEALT WITH.

I DO, HOWEVER, WISH TOUCH OFFER AS DEFENDANT'S EXHIBIT NUMBER 1 A PLEA COLLOQUY TRANSCRIPT, WHICH INCLUDES THE DISCUSSION OF WHAT MY CLIENT WAS PLEADING TO AND THE FACT THAT HE WAS CONVICTED AS AN ACCOMPLICE.

THE COURT: WELL, LET ME TAKE A LOOK AT IT.

IS THERE A STATEMENT OF FACTS CONTAINED IN IT?

MR. JOHNSTON: I DON'T RECALL THAT OFF THE TOP OF MY HEAD, YOUR HONOR. I KNOW THERE WAS A DISCUSSION OF THE FACTS INVOLVED IN THE INCIDENT.

THE COURT: YES, THERE IS A STATEMENT OF FACTS, TWO PERSONS – THIS IS OXFORD, PENNSYLVANIA.

MR. JOHNSTON: WHAT PAGE ARE YOU ON, YOUR HONOR?

THE COURT: I'M ON PAGE FIVE. THERE IS A STATEMENT OF FACTS HERE. IT SAYS TWO PERSONS WEARING SKI MASKS, CARRYING LOADED WEAPONS, ENTERED THE OXFORD PHARMACY, DEMANDED MONEY AND DRUGS, WEAPONS WERE POINTED AT MR. MCCORKLE AND MRS. BAKER. NUMEROUS DRUGS, A BANK BAG WITH MONEY,

AND PERSONAL ITEMS WERE TAKEN. I AM SUMMARIZING OR PARAPHRASING. SHORTLY AFTER THE TWO PERPETRATORS LEFT THE STORE, THE VEHICLE WAS STOPPED IN HANOVER TOWNSHIP. AN OFFICER BECAME SUSPICIOUS AND PLACED MR. CUSTIS AND TWO OTHER PEOPLE UNDER ARREST. FURTHER SEARCH FOUND MOST, IF NOT ALL, OF THE [7] OBJECTS. MR. CUSTIS GAVE A STATEMENT INDICATING THAT HE WAS PRESENT AT THE TIME THE ROBBERY TOOK PLACE, BUT WAS NOT ONE OF THE TWO PERSONS WHO HAD GONE INTO THE PHARMACY, THAT MR. CUSTIS HAD GOTTEN A CALL FROM NORRIS INDICATING HE WANTED TO GO UP TO PENNSYLVANIA TO DO A ROBBERY. MR. CUSTIS AGREED TO LET HIS MOTHER'S CAR TO BE USED, AND ONE OF THE WEAPONS BELONGED TO HIS WEAPON TO HIS MOTHER. THE OTHER TWO PEOPLE ENTERED INTO THIS ROBBERY. MR. CUSTIS REMAINED IN THE CAR. WHEN THE OTHER TWO CAME OUT OF THE STORE, THEY TOOK OFF AND WERE PICKED UP IN HANOVER.

THAT IS THE STATEMENT OF FACTS, AND FURTHER ON PAGE EIGHT THE TRIAL JUDGE SAID THAT THE COMMONWEALTH WOULD HAVE TO PROVE THAT MR. CUSTIS ACTED AS AN ACCOMPLICE WITH A SPECIFIC INTENT TO AID MR. NORRIS AND MR. DASHIEL IN THE COMMISSION OF A ROBBERY.

DO YOU HAVE ANY AUTHORITY FOR YOUR PROPOSITION – YOU DON'T HAVE ANY AUTHORITY FOR YOUR PROPOSITION THAT, IF THE INDIVIDUAL WAS NOT A PRINCIPAL, THEN YOU CAN'T COUNT?

MR. JOHNSTON: NO, YOUR HONOR.

THE COURT: I DON'T KNOWN OF ANY AUTHORITY ON THE POINT EITHER, EXCEPT THAT, IF IN FACT THERE IS ENOUGH ACCESSORYSHIP TO BE HELD AS A PRINCIPAL, WHICH APPARENTLY IT WAS IN THIS CASE, GIVEN THE NATURE OF THE OFFENSE AND THE NATURE OF THE CONVICTION THAT WAS ENTERED, THAT THE ROLE IN THE OFFENSE, WHETHER A PRINCIPAL OR ACCOMPLICE, IS THE SAME; [8] AND, OF COURSE, THAT IS THE FEDERAL SCHEME, AS WELL. THE FEDERAL SCHEME IS THAT, WHETHER YOU ARE A PRINCIPAL IN THE FIRST OR THE SECOND DEGREE, YOU ARE STILL – THE CRIMINAL LIABILITY IS THE SAME, AND I KNOW OF NO AUTHORITY UNDER THE ARMED CAREER CRIMINAL ACT THAT SAYS THAT A QUALIFYING CONVICTION MUST HAVE BEEN DONE BY THE DEFENDANT IN HIS ROLE AS A PRINCIPAL.

YOUR POINT IS MADE FOR THE RECORD. MY PLAIN READING OF THE STATUTE AND THE GUIDELINES AND THE TRANSCRIPT HERE IN EXHIBIT 1 WOULD INDICATE TO ME THAT THIS IS A QUALIFYING PREDICATE CONVICTION, BUT YOUR POINT IS NOTED FOR THE RECORD.

MR. JOHNSTON: IS EXHIBIT 1 ADMITTED?

THE COURT: YES, IT IS.

MARK IT IN, MR. CLERK, PLEASE.

MR. JOHNSTON: THAT IS ALL WE HAVE WITH RESPECT TO THE 1985 ROBBERY CONVICTION.

THE COURT: GO AHEAD.

MR. JOHNSTON: WITH RESPECT TO THE 1985 BURGLARY CONVICTION, THE ARGUMENTS MADE IN OUR MEMORANDUM THAT I SUBMITTED TO THE COURT, I WOULD LIKE TO PRESERVE THOSE TO THE FOR THE RECORD.

THE COURT: THEY ARE PRESERVED AND YOU HAVE MY VIEW ON THEM IN MY LETTER OF FEBRUARY 27; BUT, AGAIN, SINCE OBVIOUSLY THE TRANSCRIPT SHOWS YOU – SINCE YOU ARE ARGUING INEFFECTIVE COUNSEL, THERE WAS AN LAWYER THERE. SO, THE [9] TRANSCRIPT SHOWS THAT AS TO THE 1985 ROBBERY THERE WAS NO GIDEON VIOLATION; AND UNDER MY READING OF THE CASES AS PER MY MARCH 5 LETTER TO YOU, WHICH ENCLOSED THE MARCH 5 LETTER IN THE COOK CASE, WHICH FULLY SETS FORTH MY REASONING ON THIS, I WILL NOT CONSIDER A COLLATERAL ATTACK ON THIS CONVICTION AT THIS TIME, AND THEREFORE I WILL NOT MAKE FINDINGS WITH REGARD TO A STRICKLAND SIXTH AMENDMENT VIOLATION DURING THE PLEA PROCEEDING BECAUSE I DON'T THINK IT IS A COMPETENT ISSUE ON COLLATERAL ATTACK IN A 924(E) CASE.

MR. JOHNSTON: JUST FOR THE RECORD, THIS IS THE CONVICTION THAT WE WOULD HAVE LIKED TO HAVE PUT MR. CUSTIS ON TO TESTIFY THAT HE WOULD HAVE MADE THAT DEFENSE HAD HE BEEN MADE AWARE OF IT.

THE COURT: I COMPLETELY UNDERSTAND THAT, AND IF IN FACT I AM WRONG ABOUT WHAT THE SCOPE OF COLLATERAL REVIEW IS, IF IN FACT

IN A 924(E) CASE ANY ISSUE ON WHICH HABEAS CORPUS RELIEF OR 2255 RELIEF COULD BE GRANTED IS IN FACT COGNIZABLE IN ATTACKING A PREDICATE CONVICTION, IT OBVIOUSLY WILL REOPEN THE WHOLE THING, AND THEN I WILL HEAR FROM HIM DECIDE. THE GOVERNMENT MIGHT EVEN WANT TO CALL WITNESSES, ET CETERA, AT ANOTHER DATE IF WE HAVE TO RESENTENCE THIS GENTLEMAN.

MR. JOHNSTON: I DON'T MEAN TO BELABOR THIS POINT, YOUR HONOR, BUT MY CLIENT IS FACING AN AWFUL LOT OF TIME.

THE COURT: I KNOW THAT, AND I DON'T FAULT YOU FOR RAISING IT, BUT I FELT THAT THERE IS NO DEFINITIVE AUTHORITY [10] IN THIS CIRCUIT OR DISTRICT ON THIS POINT. I ASSUME YOU HAVE READ MY LETTER.

MR. JOHNSTON: YES, I HAVE.

THE COURT: HAVE YOU TURNED UP ANYTHING CONTRA TO THAT?

MR. JOHNSTON: I HAVEN'T HAD TIME. I GOT YOUR LETTER ON THE 5TH AND I HAD DUTY THAT DAY.

THE COURT: I UNDERSTAND THAT. I DON'T THINK THERE IS ANY. I MEAN, I LOOKED AT IT VERY CAREFULLY.

IN FACT, WHAT I AM GOING TO DO IS PROBABLY TURN IT INTO A BRIEF MEMORANDUM OPINION AND JUST GO AHEAD AND FILE IT IN HERE SO THAT IT CAN BE FILED.

OKAY. GO AHEAD ON.

MR. JOHNSTON: WITH RESPECT TO THE THIRD CONVICTION, THAT IS, THE ATTEMPTED – WHAT THE GOVERNMENT REFERS TO –

THE COURT: UNDERSTANDING THAT ON APPEAL YOU HAVE OBVIOUSLY THE RIGHT TO CHALLENGE MY REASONING ON ANY GROUND, LEGAL REASONING ON IT.

OKAY. GO AHEAD.

MR. JOHNSTON: THANK YOU, YOUR HONOR.

WITH RESPECT TO THE 1989 WHAT THE GOVERNMENT REFERS TO AS ATTEMPTED BURGLARY CONVICTION, I WOULD AGAIN LIKE TO REASSERT THOSE POINTS RAISED IN MY MEMORANDUM THAT THE COURT RULED ON BY LETTER.

THE COURT: ALL RIGHT. WELL, AGAIN, THE RECORD SHOWS [11] OBVIOUSLY HE WAS REPRESENTED BY AN ATTORNEY. IT WAS A STATEMENT OF FACTS, NOT GUILTY PLEA CASE, AND THERE IS NO GIDEON VIOLATION THERE.

MR. JOHNSTON: IN ADDITION, I WOULD LIKE TO OFFER DEFENDANT'S EXHIBIT NUMBER 2, WHICH IS THE ENTIRE COURT RECORD FOR THE CIRCUIT COURT OF BALTIMORE COUNTY. I DISCUSSED WITH THE GOVERNMENT AND THEY AGREED TO STIPULATE THAT THIS IS THE ENTIRE RECORD OR AT LEAST ACCEPT MY PROFFER TO THEM THAT THIS IS THE ENTIRE RECORD.

THE COURT: ALL RIGHT.

MR. JOHNSTON: THE REASON I OFFER THAT, YOUR HONOR, IS BECAUSE WE DON'T BELIEVE THAT IT IS AN ATTEMPTED BURGLARY CONVICTION. THIS WAS SOMETHING THAT WAS DISCOVERED VERY LATE IN THE GAME AND AFTER WE HAD SUBMITTED OUR MEMORANDUM AND ORDER. WE HAD BEEN APPROACHING THE ATTACK OF THE CONVICTION ON THE GROUND OF CONSTITUTIONALITY AND HAD BEEN ASSUMING, BECAUSE THE COMPUTER PRINTOUT SAID IT WAS ATTEMPTED BURGLARY, THAT IN FACT WAS THE BASIS FOR THE CONVICTION. IF THE COURT WOULD LOOK – I DON'T HAVE THESE PAGES NUMBERED, BUT I CAN FIND IT FOR THE COURT. THERE IS A STATEMENT OF CHARGES.

THE COURT: I HAVE GOT IT.

MR. JOHNSTON: THE PAGE RIGHT BEFORE THAT. THOSE ARE THE ONLY CHARGING DOCUMENTS THAT ARE IN THE FILE, AND THE OFFICER THERE WROTE DOWN DID ATTEMPT TO BREAK AND ENTER IN THE DAYTIME DWELLING HOUSE OF THE INDIVIDUAL AND THE REST OF THE [12] CHARGE. HE THEN CHECKED THE BOX COMMON LAW OF MARYLAND, WHICH DOESN'T SHOW UP ON THIS COPY.

THE COURT: I SEE IT ON THIS ONE.

MR. JOHNSTON: IT SHOWS THAT HE CHECKED COMMON LAW OF MARYLAND.

NOW, WE HAVE A NUMBER OF POINTS ABOUT THAT THAT, YOUR HONOR, THAT RAISE US CONCERN. FIRST OF ALL, THERE ARE NO OTHER CHARGING DOCUMENTS IN HERE THAT WE COULD LOCATE, AND THAT WOULD LEAD US TO BELIEVE THAT IT TAKES IT OUT OF THE ENUMERATED CRIMES UNDER THE ARMED CAREER CRIMINAL ACT. IT'S NO LONGER A BURGLARY. IT'S AN ATTEMPTED BREAKING AND ENTERING.

SECONDLY, THERE REMAINS THE ISSUE OF WHETHER OR NOT THIS CAN RELATE OR EQUAL A CRIME OF VIOLENCE AS A CATCHALL PHRASE AS A PART OF THE ARMED CAREER CRIMINAL ACT.

THE COURT: ISN'T THERE AUTHORITY FROM THE FOURTH CIRCUIT THAT SAYS BREAKING AND ENTERING A DWELLING HOUSE IS SUFFICIENT? DOESN'T TAYLOR SAY THAT?

MR. JOHNSTON: NO, I DON'T BELIEVE IT DOES, YOUR HONOR.

THE COURT: IT DOESN'T? EVEN THE STATEMENT OF CHARGES SAYS THAT BREAKING AND ENTERING OF A DWELLING HOUSE. DAYTIME – ISN'T THAT WHAT TAYLOR DEALT WITH?

MR. JOHNSTON: IT WAS A BURGLARY, YOUR HONOR. TAYLOR SPECIFICALLY TALKED ABOUT THE SECOND PRONG OF BURGLARY, THE [13] NEED FOR AN INTENT TO COMMIT A FELONY AS THE REASON FOR THE BREAKING AND THE ENTERING. THERE ARE TWO PRONGS.

THE COURT: ALL RIGHT. GO AHEAD ON.

MR. JOHNSTON: AND TAYLOR EMPHASIZED THAT SECOND PART OF IT AS WHAT YOU CALM [sic] BURGLARY.

I THINK THE CASE LAW IS CLEAR, YOUR HONOR, THAT THIS IS NOT THE MINOR GENERIC BURGLARY UNDER THE TAYLOR DEFINITION.

SO, THEN WE MOVE ON TO THE CONSIDERATION OF WHETHER OR NOT THIS IS IN FACT A CRIME OF VIOLENCE. IF YOU TURN TO THE STATEMENT OF FACTS OR ACTUALLY THE CASE WAS TRIED BASICALLY ON THIS OFFICER'S STATEMENT OF CHARGES. I BELIEVE THE PROSECUTOR BASICALLY JUST READ THE STATEMENT OF CHARGES TO THE JUDGE. THE DEFENSE COUNSEL MOVED FOR A JUDGMENT OF ACQUITTAL, AND THE JUDGE OVERRULED IT; BUT, AS YOU CAN SEE FROM THE STATEMENT OF FACTS, IT DOESN'T ESTABLISH ANY ENTRY WHATSOEVER. THE BEST THIS CASE ESTABLISHES IS BASICALLY VANDALISM, AND THERE WAS NO INTENT FOR THE COURT TO DIVINE OF ANY DESIRE TO ENTER WHATSOEVER.

BASED ON THE STATEMENT OF CHARGES, YOUR HONOR, AND THE FACT THAT THIS WAS MERELY AN ATTEMPTED BREAKING AND ENTERING, NOT EVEN A BREAKING AND ENTERING, AND THAT AT LAST THE VERY IMPORTANT SECOND HALF OF THAT PRONG OF TAYLOR, THE ATTEMPT TO COMMIT A FELONY WHILE INSIDE, I THINK THAT THIS DOESN'T COUNT UNDER THE ARMED CAREER CRIMINAL ACT.

THE COURT: WELL, WHAT DO YOU HAVE TO SAY ABOUT THAT, [14] MR. DIBIAGIO?

MR. DIBIAGIO: WELL, YOUR HONOR, I AM GOING THROUGH THIS NOW. I HAVE ALREADY FOUND THREE PLACES WHERE THE CHARGES ARE CLEARLY DELINEATED OUT AS ATTEMPTED BURGLARY, THE THIRD PAGE IN, THE TRIAL CHARGES, ATTEMPTED BURGLARY.

THE COURT: WHAT A BAG OF WORMS. THESE OPERATION TRIGGERLOCK CASES ARE THE BIGGEST DISASTER THAT HAVE HIT THIS COURT IN TERMS OF FOULED UP RECORDS AND COLLATERAL ISSUES AND MAKING A HASH OUT OF THE SENTENCING PROCEEDINGS. I HAVE NEVER EXPERIENCED ANYTHING LIKE THIS. I THOUGHT MY LETTER HAD PRECLUDED COLLATERAL REVIEW. NOW WE ARE GOING INTO THE STATEMENT OF CHARGES AND STATE COURT RECORDS. LET'S BRING THE COP IN HERE TO TESTIFY ABOUT WHAT HAPPENED. THERE IS NO END TO THIS.

MR. DIBIAGIO: WELL, YOUR HONOR, CLEARLY THIS IS NOT A GIDEON CHALLENGE. THERE ARE PLENTY OF DOCUMENTS.

THE COURT: NO, BUT IT IS A PREDICATE OFFENSE CHALLENGE UNDER TAYLOR. IT OPENS UP THE WHOLE THING, NOT AS TO THE CONSTITUTIONAL ISSUE, BUT AS TO WHETHER IT IS A QUALIFYING CONVICTION.

MR. DIBIAGIO: WELL, WE HAVE A CERTIFIED COPY OF ATTEMPTED BURGLARY.

THE COURT: COPY OF WHAT?

MR. DIBIAGIO: A CERTIFIED COPY OF WHAT HE WAS CONVICTED OF.

[15] THE COURT: THAT DOESN'T MATTER. LOOK AT WHAT TAYLOR SAYS. YOU HAVE TO LOOK AT THE FACTS, DON'T YOU? DOESN'T TAYLOR SAY THAT IT IS NOT WHAT YOU CALL THE OFFENSE, BUT WHAT THE UNDERLYING CONDUCT WAS? MAYBE I AM WRONG. MAYBE I AM WRONG ABOUT THAT. LET'S GET TAYLOR AND LET'S READ IT. IT IS 58 LAW WEEK.

MR. JOHNSTON: YOUR HONOR, WHILE WE ARE WAITING FOR THAT, I ALSO HAVE CASE AUTHORITY FROM MARYLAND THAT SPECIFICALLY DEALS WITH THE CRIME OF BREAKING AND ENTERING AS OPPOSED TO BURGLARY AND THE REASONS WHY THE BREAKING AND ENTERING SECTIONS WERE ENACTED INTO LAW.

THE COURT: I DON'T SEE ANYTHING IN THE STATEMENT OF FACTS, MR. DIBIAGIO, IN THIS CASE THAT SHOWS ANY PROOF OF INTENT TO STEAL, WHICH IS OF COURSE THE INTENT TO COMMIT FELONY IN THE PREMISES, WHICH IS A REQUIRED ELEMENT OF BURGLARY.

MR. JOHNSTON: THESE CASES –

THE COURT: WHAT A DISASTER.

THIS IS A BALTIMORE COUNTY CASE.

MR. DIBIAGIO: WE HAVE THE TRANSCRIPT, YOUR HONOR.

THE COURT: YOU HAVE THE TRANSCRIPT, THAT'S RIGHT. READ THE TRANSCRIPT AND SHOW ME ANYTHING MORE THAN THAT THE OCCUPANT OF THE HOUSE WAS WAKENED BY THE SOUND BREAKING OF GLASS AND GOT DOWNSTAIRS AND HE SAW PEOPLE GETTING INTO A CAR AND LEAVING.

[16] DIDN'T THE FOURTH CIRCUIT DECIDE A CASE OF BREAKING AND ENTERING OF A DWELLING HOUSE?

MR. JOHNSTON: I AM SORRY, YOUR HONOR. I AM NOT AWARE OF IT.

THE COURT: I THOUGHT THAT THEY HAD. I THOUGHT IT WAS ONE THAT CAME UP FROM JUDGE RAMSEY, WHERE THEY SAID THAT THE BREAKING AND ENTERING OF A DWELLING HOUSE WAS A PREDICATE OFFENSE.

HOLD ON A MINUTE. WE WILL RECESS THE PROCEEDINGS.

(AFTER RECESS:)

THE COURT: I FOUND THE ANSWER. THE ANSWER LIES IN TWO CASES. ONE IS THE CASE OF U.S. V. WILSON WHICH IS A PUBLISHED DECISION OF THE FOURTH CIRCUIT. I DON'T HAVE THE CITE. IT IS 90-5203, IN WHICH THE FOURTH CIRCUIT SAID AFTER TAYLOR THAT THE ARMED CAREER CRIMINAL ACT DEFINITION OF VIOLENT CRIMES, WHICH IS THE SAME AS THE GUIDELINES DEFINITION, FORBIDS ANY INQUIRY INTO THE PARTICULAR FACTS

UNDERLYING THE DEFENDANT'S PRIOR CONVICTION FOR BURGLARY. AS LONG AS THE RECORD SHOWS THAT IT WAS BURGLARY, THAT'S IT, AND THE RECORD THE DOCKET INDICATES THAT HE WAS CONVICTED OF BURGLARY, THE TRANSCRIPT SHOWS HE WAS CONVICTED OF BURGLARY, AND THAT IS THE END OF IT, SO LONG AS UNDER STATE LAW THE ELEMENTS OF BURGLARY QUALIFY UNDER TAYLOR, WHICH OF COURSE THEY DO IN MARYLAND.

NOW, THE SECOND THING IS, WHICH IS EVEN MORE TO THE [17] POINT, THAT IN THE CASE CALLED U.S. V. MASON, WHICH WAS JUST DECIDED JANUARY 17TH, APPEALED FROM JUDGE GARBIS, 1992 WEST LAW 6281, THE FOURTH CIRCUIT REVERSED JUDGE GARBIS FOR FAILING TO SENTENCE SOMEBODY AS AN ARMED CAREER CRIMINAL, AND OF THE THREE PREDICATE CONVICTIONS ONE OF THEM WAS A DAYTIME HOUSEBREAKING.

SO, THE BOTTOM LINE IS IT DOESN'T MATTER; AND THE REASON IT DOESN'T MATTER IS, OF COURSE, BECAUSE THE DAYTIME HOUSEBREAKING DOES INVOLVE – IN THE WORDS OF THE ARMED CAREER CRIMINAL ACT, DOES INVOLVE THE POTENTIAL ELEMENTS OF VIOLENCE, BECAUSE, IF SOMEBODY IS IN THE HOUSE, WHICH HAPPENED IN THE BALTIMORE COUNTY CASE, IN FACT –

MR. JOHNSTON: I DON'T THINK THERE WAS ANY –

THE COURT: WELL, I THOUGHT THERE WAS SOMEBODY IN THE HOUSE.

MR. DIBIAGIO: THE RECORD REFLECTS SOMEBODY WAS ASLEEP.

THE COURT: YES. SOMEBODY WAS SLEEPING INSIDE THE HOUSE.

MR. JOHNSTON: I THOUGHT YOU MEANT THE PERPETRATOR WAS IN THE HOUSE.

THE COURT: NO, NO, NO. SOMEBODY WAS SLEEPING INSIDE THE HOUSE; AND, SINCE SOMEBODY WAS SLEEPING INSIDE THE HOUSE, I MEAN, THE VIOLENCE CAN BE THAT PERSON SHOOTING THE PERSON WHO WAY TRYING TO BREAK IN. THAT IS ALL IT TAKES, AND [18] THAT IS ENOUGH TO BE VIOLENT, AND THAT OTHERWISE INVOLVES CONDUCT THAT PRESENTS A SERIOUS POTENTIAL RISK OF PHYSICAL INJURY TO SOMEONE UNDER 924(E)(2)(B)(2).

SO, THAT IS THE END OF THAT INQUIRY RIGHT THERE. I THINK THE FOURTH CIRCUIT WOULD CLEARLY SAY THAT DAYTIME HOUSEBREAKING, EVEN THOUGH IT IS NOT A BURGLARY, HAS THAT RISK TO IT.

ALL RIGHT. LET'S GO ON TO THE NEXT POINT.

MR. JOHNSTON: YOUR HONOR, JUST BY POINT OF CLARIFICATION IN TERMS OF MY ARGUMENT, WE HAD MET OUR BURDEN TO SHOW THAT HE HAD NOT BEEN CONVICTED OF ANYTHING MORE THAN ATTEMPTED BREAKING AND ENTERING.

THE COURT: WELL, EVEN IF IT'S AN ATTEMPT, THAT IS ENOUGH.

MR. JOHNSTON: I WANTED TO MAKE THE ADDITIONAL ARGUMENT ABOUT ATTEMPT. ATTEMPTED BREAKING AND ENTERING IS EVEN FARTHER REMOVED, AND I THINK TAYLOR DOES AUTHORIZE, LOOKING IN THE FACTS OF A CASE IN CERTAIN INSTANCES; AND I THINK, IF YOU LOOK AT THE FACTS OF THIS CASE, THERE IS NO INFORMATION THAT MY CLIENT WAS EVER IN THE HOUSE TO CREATE ANY SORT OF DANGER IN THE FIRST PLACE.

THE COURT: WELL, HE COULD BE SHOT THROUGH THE WINDOW.

MR. JOHNSTON: AND VANDALISM WOULDN'T APPLY, YOUR HONOR?

[19] THE COURT: NO, BECAUSE HE WAS NOT TRYING TO GET INTO THE HOUSE, AND HE WASN'T CONVICTED OF VANDALISM.

AND MY AUTHORITY FOR SAYING THAT THE FACT THAT IT WAS AN ATTEMPT MAKES IT JUST AS MUCH A PREDICATE OFFENSE AS A COMPLETED OFFENSE IS U.S. V. LANE, 909 F.2D 895 AT 903, SIXTH CIRCUIT, 1990; AND IN MARYLAND THE OFFENSE THERE IS ESSENTIALLY THE SAME AS THE OHIO OFFENSE. THIS DOES QUALIFY IN MY JUDGMENT AS A PREDICATE.

LET'S GO TO THE NEXT ONE, IF YOU HAVE A NEXT ONE.

MR. JOHNSTON: ONE OF THE ARGUMENTS I WANT TO MAKE ABOUT THAT, ATTEMPTED BURGLARY VERSUS ATTEMPTED BREAKING AND ENTERING, IS THAT IT JUST DOESN'T APPEAR TO BE PROPERLY CHARGED, IN ANY EVENT.

THE COURT: WELL, AS THE FOURTH CIRCUIT SAID IN WILSON, A DECISION WITH WHICH I COMPLETELY AGREE BY JUDGE WILKINSON, WHERE HE PREVAILED ON THAT ONE, WHICH HE DIDN'T PREVAIL IN THE JONES CASE, AND WHAT HE SAID IN THE WILSON CASE IS THAT YOU SIMPLY DO NOT RELITIGATE THE UNDERLYING CASE. YOU DON'T GO INTO IT. THAT IS THE END OF IT. NOT WILSON – YES, IN THE U.S. V. WILSON CASE. YOU JUST DON'T GO INTO IT AND YOU DON'T GO INTO WHAT THE STATEMENT OF CHARGES SAID AND WHO STRUCK JOHN ABOUT WHAT HAPPENED. YOU LOOK AT THE RECORD, AND THE RECORD SAYS BURGLARY, AND THAT IS THE END OF IT.

I AM SAYING HERE, EVEN IF IT WAS AN ATTEMPTED [20] DAYTIME HOUSEBREAKING, THAT STILL IS ENOUGH UNDER THE FOURTH CIRCUIT DECISION IN THE MASON CASE THAT I JUST AVERTED TO.

ALL RIGHT. LET'S GO TO THE NEXT ONE, PLEASE.

MR. JOHNSTON: I JUST WANTED TO FINISH BY SAYING, YOUR HONOR, THAT THAT WOULD BE – I WANTED TO RAISE THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM ON THE BASIS OF THAT,

BASICALLY, THAT COUNSEL GOT HER CLIENT CONVICTED OF SOMETHING THAT DIDN'T EVEN EXIST.

THE COURT: ALL RIGHT. SO, NOW YOU ARE RAISING A STRICKLAND CLAIM AS TO THE STATEMENT OF FACTS BALTIMORE COUNTY CASE AS WELL.

MR. JOHNSTON: THAT IS RIGHT, YOUR HONOR.

THE COURT: ALL RIGHT. WELL, AGAIN, THAT COULD BE A HABEAS CORPUS CLAIM, AND I AM NOT GOING TO MAKE ANY FINDINGS ON IT. THE REASON I'M NOT GOING TO MAKE ANY FINDINGS ON IT S [sic] BECAUSE I BELIEVE THE SCOPE OF COLLATERAL REVIEW UNDER 924(E) IS CONFINED TO GIDEON VIOLATION. AS LONG AS THE LAWYER IS ALIVE AT THE TIME OF TRIAL AND IS BREATHING AND IS PHYSICALLY PRESENT, THERE IS NO VIOLATION OF GIDEON; AND, TO MY WAY OF LOOKING AT ALL OF THE CASES, FOR THE REASONS I AMPLY STATED IN MY LETTER OPINION, IF YOU HAVE GOT A LIVING AND BREATHING LAWYER THERE, THAT IS THE END OF IT IN TERMS OF THIS INQUIRY ON A 924(E) COLLATERAL CONVICTION.

IF THE FOURTH CIRCUIT WANTS TO TELL ME AND ALL OF THE OTHER DISTRICT JUDGES IN THE CIRCUIT THAT IN EVERY OPERATION [21] TRIGGERLOCK CASE AND BY EXTENSION IN EVERY ARMED CAREER CRIMINAL CASE AND IN EVERY CAREER OFFENDER CASE WE ARE TO ENTERTAIN A PLENARY HABEAS CORPUS REVIEW ON SENTENCING OF EVERY PREDICATE CONVICTION, I WILL BE

MORE THAN GLAD TO DO IT. IT WILL TAKE, OF COURSE, PRACTICALLY ALL DAY AND ALL NIGHT TO SENTENCE PEOPLE. WE WILL NOT HAVE TIME FOR TRIALS OF OTHER CRIMINAL CASES. WE WILL NOT HAVE TIME TO TRY CIVIL CASES, AND RUNNING THE COURT ON 24 HOUR A DAY BASIS. IF THAT IS WHAT THE FOURTH CIRCUIT WANTS, I AM MORE THAN GLAD TO EXCEED TO THEIR DESIRE, BECAUSE I GET PAID TO BE HERE AND DO WHAT THEY WANT TO TELL ME; AND, IF THAT'S THE DECISION THAT THEY WANT TO REACH, THAT'S FINE, I WILL ABIDE BY IT, BUT RIGHT NOW, AS I READ THE CASE LAW, THAT DECISION WOULD BE PLAINLY WRONG UNDER TUCKER, VERGETTE, GRAVES, AND THE OTHER AUTHORITIES, INCLUDING JUDGE WILKINSON'S DISSENT IN JONES, WHICH I THINK WAS RIGHT.

OKAY. THAT IS MY STATEMENT OF OPINION, AND THAT IS VERY CLEAR, I THINK.

MR. JOHNSTON: THANK YOU, YOUR HONOR.

THE COURT: YES, SIR.

MR. JOHNSTON: OUR NEXT ARGUMENT WITH RESPECT TO ARMED CAREER CRIMINAL STATUS GOES TO THE LEGITIMACY OF THE GUIDELINE 4B1.4 IN THE FIRST PLACE, IN THAT IT LACKS THE AUTHORITY OF ANY CONGRESSIONAL STATUTE DELEGATING TO THE SENTENCING COMMISSION THE AUTHORITY TO PROMULGATE THIS [22] PARTICULAR GUIDELINE.

THE COURT: WELL, THE GENERAL DELEGATION OF AUTHORITY IN SECTION 994 OF TITLE 28 IS ADEQUATE FOR REASONS I INDICATED TO YOU EARLIER IN MY LETTER ON THIS POINT, WHICH WOULD HAVE BEEN DISCUSSED IN PARAGRAPH FOUR OF MY LETTER TO YOU OF JANUARY 30TH.

MAKE SURE THAT IS ON FILE, TOO, RON. DOES THE DOCKET SHOW A COPY OF A LETTER TO COUNSEL DATED JANUARY 30TH?

IN ANY EVENT, I DON'T BUY THE ULTRA VIRES ARGUMENT. THE SENTENCE IS OPEN ENDED, FIFTEEN YEARS TO LIFE. THE SENTENCING REFORM ACT GIVES THE GUIDELINES COMMISSION CARTE BLANCH [sic] TO MAKE ANY GUIDELINES THEY WANT THAT ARE CONSONANT WITH THE PURPOSES OF THE ACT. I THINK THESE ARE CONSONANT WITH THE PURPOSES OF THE ACT UNDER 3553(A)(2).

THE CLERK: THE LETTER OF JANUARY 30TH IS PAPER 40.

THE COURT: OKAY.

GO AHEAD ON, NEXT POINT.

MR. JOHNSTON: YOUR HONOR, THE REST OF MY ARGUMENTS PERTAIN TO THE ACCEPTANCE OF RESPONSIBILITY AND DOWNWARD DEPARTURE.

THE COURT: I WILL HEAR YOU ON THAT NOW, THEN.

MR. JOHNSTON: I WOULD JUST REASSERT OUR ARGUMENT THAT WAS IN THE LETTER TO THE

PROBATION OFFICER ON THE GROUNDS OF ACCEPTANCE OF RESPONSIBILITY.

THE COURT: I AM NOT GOING TO GRANT AN ACCEPTANCE OF [23] RESPONSIBILITY ON THIS RECORD. THE ACCEPTANCE OF RESPONSIBILITY HERE WAS FOR A TRIFLING OFFENSE, INVOLVING A TINY AMOUNT OF NARCOTICS. THE SUBSTANTIAL AND SEVERE, WHICH IS THE HANDGUN VIOLATION THERE HAS NOT BEEN ANY ACCEPTANCE OF RESPONSIBILITY FOR. THEREFORE, NO ADJUSTMENT UNDER 3E1.1.

NEXT POINT.

MR. JOHNSTON: WITH RESPECT TO DOWNWARD DEPARTURES, YOUR HONOR, I WOULD LIKE TO REASSERT AS GROUNDS FOR DOWNWARD DEPARTURES ALL OF THE PROBLEMS THAT WE HAVE ASSERTED WITH RESPECT TO THE OTHER CONVICTIONS, PARTICULARLY THE LAST ONE, THE BREAKING AND ENTERING IN '89. WHAT I AM SAYING, YOUR HONOR, I GUESS, BASICALLY IS THOSE CONVICTIONS ARE NOT – AT LEAST TWO OF THOSE CONVICTIONS WERE NOT SITUATIONS WHERE MY CLIENT DIRECTLY PARTICIPATED IN ANY DANGEROUS ACTIVITY. I THINK THAT THOSE ARE THINGS THAT ARE BEYOND THE NORMAL ARMED CAREER CRIMINAL SITUATION, WHERE THE PERSON WAS A PRINCIPAL OR ENGAGED IN VIOLENT CONDUCT IN ALL THREE. MY CLIENT WAS ONLY AN ARMED CAREER CRIMINAL BY THE TECHNICAL DEFINITION THE COURT HAS GIVEN TODAY AND BY SOME OF THE OTHER CASE LAW THAT EXISTS.

I WANT TO ARGUE, YOUR HONOR, THAT THE COMBINATION OF THESE THREE PARTICULAR CONVICTIONS IN THIS PARTICULAR CASE ARE THE KINDS OF THINGS THAT WERE NOT IN CONTEMPLATION OF THE SENTENCING COMMISSION.

THE COURT: WELL, IN ANY EVENT, IT COULDN'T GO BELOW [24] FIFTEEN YEARS.

MR. JOHNSTON: WELL, I UNDERSTAND THAT, YOUR HONOR. I AM ASKING TO GO TO A DOWNWARD DEPARTURE TO THAT LEVEL OF FIFTEEN BASED ON THE NATURE OF THESE CONVICTIONS AND THE OTHER GROUNDS THAT I RAISED MY LETTER.

THE COURT: DO YOU WANT TO ADDRESS THIS, MR. DIBIAGIO?

MR. DIBIAGIO: YOUR HONOR, THE GOVERNMENT SEES ABSOLUTELY KNOW [sic] GROUNDS WHATSOEVER FOR DEPARTING FROM THE GUIDELINES IN THIS CASE. THIS IS A CAREER OFFENDER, NOT ONLY IN THE STATUTORY TERMS, BUT ALSO IN HIS LIFE. HE STARTED HIS LIFE OUT WITH FIRST DEGREE MURDER, JUVENILE ADJUDICATION, AND HE HAS NEVER STOPPED. HE HAS GONE MULTI-JURISDICTIONAL. HE'S USED A FIREARM. HE IS COLD. HE IS CALCULATED. HE IS WHAT THEY CALL ON THE STREETS A THUG. HE IS VIOLENT, AND THERE IS ABSOLUTELY NO WAY WHATSOEVER THAT THIS INDIVIDUAL DESERVES ANY COMPASSION OR SYMPATHY FROM THIS COURT.

THE COURT: WELL, COMPASSION AND SYMPATHY ARE NOT GROUNDS FOR DEPARTURE, NOR ARE THEY CONSIDERED BY THE SENTENCING COMMISSION, NOR MAY I PROPERLY CONSIDER THEM. YOU STILL HAVEN'T ADDRESSED THE FACT THAT THIS THESE PREDICATE CONVICTIONS, ALTHOUGH THEY TECHNICALLY QUALIFY, SHOW CONDUCT ON THE LOW END OF THE SCALE OF WHAT QUALIFIES AS PREDICATE CONVICTIONS. IS THAT RIGHT OR IS THAT WRONG?

MR. DIBIAGIO: I WOULDN'T AGREE WITH THAT, YOUR [25] HONOR. I WOULDN'T AGREE THAT JUST BECAUSE IN ONE CASE HE DROVE THE CAR AWAY FROM AN ARMED ROBBERY, THAT HE DESERVES ANY LESS CULPABILITY. THE LAW DOESN'T RECOGNIZE ANY LESS CULPABILITY FOR HIS ROLE, AND WE DON'T BELIEVE AT SENTENCING YOU THAT SHOULD CONSIDER ANY LESS CULPABILITY.

THE COURT: WELL, THE SENTENCING COMMISSION, WHEN THE PROMULGATED THIS GUIDELINE THAT UPPED ALL OF THE ARMED CAREER CRIMINALS TO 33 OR 34, TO WHAT EXTENT DID THEY TAKE INTO ACCOUNT THE CONDUCT THAT MIGHT UNDERLIE THE PREDICATE CONVICTIONS? ISN'T 3553 GIVING THE AUTHORITY, IF IT WAS NOT ADEQUATELY CONSIDERED, TO USE IT AS DEPARTURE GROUND?

MR. DIBIAGIO: IT MAY IN SOME INSTANCES.

THE COURT: IN ANY INSTANCE. 3553(B) SAYS, IF I FIND THE COMMISSION DID NOT ADEQUATELY CONSIDER A FACTOR THAT OUGHT TO RESULT IN A LOWER SENTENCE OR A HIGHER SENTENCE, I CAN DEPART. THIS IS THE SHARD OF DISCRETION THAT REMAINS.

MR. DIBIAGIO: THAT'S CORRECT, YOUR HONOR, AND THAT IS REALLY WHERE I WAS ADDRESSING MY FIRST ARGUMENT. YOU HAVE THE DISCRETION UNDER THAT, IF YOU BELIEVE SOME SORT OF UNFAIRNESS BASED ON THE PREDICATE OFFENSES, BASED ON HIS CONDUCT.

THE COURT: UNFAIRNESS DOESN'T HAVE ANYTHING TO DO WITH IT. WHAT IT HAS TO DO WITH IT IS IS IT A FACTOR THAT WAS ADEQUATELY CONSIDERED BY THE COMMISSION. IS IT OR ISN'T IT?

[26] MR. DIBIAGIO: I BELIEVE IN THIS CASE HE IS NOT – THE ARMED CAREER CRIMINAL STATUS AS APPLIED TO THIS DEFENDANT IS FULLY ADEQUATE AND APPROPRIATE.

THE COURT: NO, IT'S NOT A QUESTION OF THE STATUS. THE QUESTION IS – HE IS NOT ARGUING THE STATUS RIGHT NOW. THERE IS NO DEPARTURE FROM THE STATUS. THE QUESTION IS WHETHER THERE OUGHT TO BE A DEPARTURE BELOW THE BASE OFFENSE LEVEL SPECIFIED IN 4B1.4 ON THE GROUND THAT THE COMMISSION DID NOT ADEQUATELY CONSIDER IN MAKING THAT

BASE OFFENSE LEVEL THE NATURE OF THE PREDICATE CONVICTIONS IN TERMS OF THE DEFENDANT'S INVOLVEMENT AND THE KIND OF OFFENSES HE COMMITTED AND WHAT THE ACTUAL OFFENSE CONDUCT WAS.

MR. DIBIAGIO: I THINK THAT IS A CORRECT STATEMENT, THAT THAT PARAGRAPH ALLOWS THE COURT, IF THE PREDICATE OFFENSES ARE NOT ADEQUATELY TAKEN INTO CONSIDERATION – I KNOW I MAY BE SLOW IN UNDERSTANDING THE COURT, AND I APOLOGIZE FOR THAT. WHAT I AM GETTING TO IS THE CORE ISSUE IS, BECAUSE MR. JOHNSTON ARGUED THAT HE HAD SOME SORT OF MINOR ROLE IN THESE PREDICATE OFFENSES, THAT UNDER THAT PARAGRAPH THERE SHOULD BE A DEPARTURE. IS THAT CORRECT, YOUR HONOR?

THE COURT: THAT'S RIGHT. UNDER 3553(B), THE COMMISSION DID NOT ADEQUATELY CONSIDER THE FACTOR AND THAT IT OUGHT TO MITIGATE.

NOW, WHAT THE I AM TRYING TO THE GET OUT OF YOU IS [27] THE GOVERNMENT'S POSITION IN THIS CASE AS TO WHETHER UNDER 3553(B) THE FIRST PRONG IS SATISFIED. THAT IS, DID COMMISSION ADEQUATELY CONSIDER THIS FACTOR AS A DEPARTURE FACTOR, THAT IS, THAT THE ROLE OF THE DEFENDANT IN THE PREDICATE ARMED CAREER CRIMINAL OFFENSES MIGHT HAVE BEEN A MINOR ROLE OR THE OFFENSES MIGHT HAVE BEEN AT THE LOW END OF THE POSSIBLE RANGE OF DANGEROUSNESS.

MR. JOHNSTON: OR THE QUALITY OF HIS REPRESENTATION. I WANT TO THROW THAT IN THERE, TOO.

THE COURT: THROW IT IN.

MR. DIBIAGIO: JUST ONE SECOND, YOUR HONOR.

(PAUSE.)

MR. DIBIAGIO: I THINK THE COMMISSION DID, AND THE REASON WHY THE COMMISSION DID IS REALLY WHAT THE PROBLEM IS THAT WE HAVE HERE, BECAUSE, IF YOU SAY THAT THE COMMISSION DOES NOT ADEQUATELY CONSIDER THE SPECIFIC FACTS OF EACH PREDICATE OFFENSE, THEN IN EVERY CASE THEY COULD ARGUE IT WOULD BE OPENING UP THE PARTICULAR FACTS.

THE COURT: WELL, LOOK AT 4B1.4, WHICH IS BARE BONES. ALL IT SAYS IS BINGO, 33 OR 34.

MR. DIBIAGIO: WE BELIEVE THAT THAT ADEQUATELY TAKES INTO CONSIDERATION, IF THE –

THE COURT: WHERE ARE THE APPLICATION NOTES, BACKGROUND, COMMENTARY, RATIONALE, REASONING, ANYTHING? THEY DIDN'T BOTHER. HOW CAN THAT BE ADEQUATE CONSIDERATION?

[28] MR. DIBIAGIO: WHAT THEY APPARENTLY LOOKED TO IS THEY LOOKED TO IF THE INDIVIDUAL HAS BEEN CONVICTED OF THE PREDICATE OFFENSES.

THE COURT: BUT HOW DID THEY GET TO 34?

MR. DIBIAGIO: YOUR HONOR, I DON'T KNOW. I DON'T KNOW ALL OF THE HISTORY BEHIND WHERE – WHY IS IT 34 AND NOT 35? I DON'T KNOW THAT. I HAVE TO HAVE FAITH IN WHAT THEY DID, AND I NEED TO EXECUTE THAT WITH CONFIDENCE, AND I THINK IN THIS CASE I CAN ARGUE WITH CONFIDENCE THAT THIS IS NOT A MITIGATION TYPE OF CASE. THIS IS NOT A DEPARTURE TYPE OF CASE.

THE COURT: BE CAREFUL WHERE YOU PUT YOUR FAITH, MR. DIBIAGIO.

MR. DIBIAGIO: WELL, YOUR HONOR, I UNDERSTAND THE COURT HAS A LOT OF PROBLEMS WITH THE SENTENCING GUIDELINES. I UNDERSTAND THAT. I HAVE BEEN BEFORE YOU AT SENTENCINGS BEFORE. SOME OF THEM ARE VERY LEGITIMATE, AND I UNDERSTAND THAT, BUT I THINK IN THIS CASE, I THINK LET'S PUT ASIDE THE PROBLEMS WE HAVE WITH THE SENTENCING GUIDELINES, AND IN THIS CASE, WITH THIS DEFENDANT –

THE COURT: BUT, SEE, THE PROBLEM IS THIS WHOLE PROCESS HAS DEGENERATED INTO HYPERTECHNICAL NITPICKS, AND RIGHT NOW WE ARE PICKING A PARTICULAR NIT, AND THE NIT IS WHETHER UNDER 3553(B) THE SENTENCING COMMISSION IN PROMULGATING THE GUIDELINE LEVEL, THE BASE OFFENSE LEVEL OF 33 [29] OR 34 FOR ARMED CAREER CRIMINALS, ADEQUATELY

TOOK INTO ACCOUNT A FACTOR THAT IS ARGUED BY THE DEFENSE HERE, OR A NUMBER OF FACTORS THAT ARE ARGUED BY THE DEFENSE HERE, THAT IS, QUALITY OF REPRESENTATION, NATURE OF THE UNDERLYING CONDUCT, WHAT HAVE YOU, AND THAT IS THE FIRST QUESTION.

THE NEXT QUESTION, WHICH IS THE ONE I THINK YOU ARE TRYING TO ADDRESS, IS OUGHT IT IN THIS CASE RESULT IN A LOWER SENTENCE. SO, WHAT I AM TRYING TO DO IS GET THE ANSWER TO THE FIRST QUESTION FIRST.

MR. DIBIAGIO: THE GOVERNMENT'S ANSWER TO THE FIRST QUESTION IS YES, IT ADEQUATELY DID.

THE COURT: ALL RIGHT. THAT'S ALL I WANT TO HEAR. LET'S GO ON THE NEXT QUESTION, THEN.

THE [sic] DIBIAGIO: ASSUMING THAT IT DID NOT, WITH THIS PARTICULAR CASE, BECAUSE THE GOVERNMENT'S POSITION IS THE ARGUMENT STOPS RIGHT THERE. IF THE SENTENCING COMMISSION ADEQUATELY TOOK IT INTO CONSIDERATION –

THE COURT: I UNDERSTAND THAT.

MR. DIBIAGIO: – THE GOVERNMENT STOPS.

THE COURT: ALL RIGHT.

MR. DIBIAGIO: BUT, FOR THE PURPOSES OF TODAY, FOR THE PURPOSES OF TODAY'S DISCUSSION, LET'S ASSUME THAT IT DID NOT. THIS DEFENDANT? I DON'T THINK THERE IS ANY TYPE OF BASIS

FOR DEPARTURE FOR THIS DEFENDANT. I MEAN, THE ROLE IN THE OFFENSES FOR THIS DEFENDANT? YOUR HONOR, YOU HAVE READ [30] THE RECORD, AND I CAN STAND UP HERE AND TALK ABOUT HIS CAREER ACTIVITIES. HE HAS NEVER CONTRIBUTED TO SOCIETY. HE HAS NEVER SET HIMSELF STRAIGHT. I HAVE READ THE SENTENCING AND ALL OF HIS CONVICTIONS THAT THE DEFENSE HAS PUT UP, AND THEY ALL SAID THE SAME THING, GIVE HIM ONE MORE CHANCE, GIVE HIM A CHANCE HERE, GIVE HIM AN [sic] CHANCE THERE, AND HE REPEATEDLY GOES ON TO CRIMINAL CONDUCT, REPEATEDLY GOES BACK TO THE STREETS, REPEATEDLY VIOLENCE, AND HE HAS THE BENEFIT OF THE JUVENILE SYSTEM, HE HAD BENEFIT OF STATE COUNSELING, HE HAS HAD THE BENEFIT OF PENNSYLVANIA'S CAREER CORRECTION SYSTEM, MARYLAND'S CORRECTIONAL SYSTEM, BALTIMORE COUNTY, BALTIMORE CITY, MULTI-JURISDICTIONAL. HE IS A GANGSTER, HE IS NOT SOMEONE WHO HAS ERRED IN BETWEEN WORKING LEGITIMATELY.

THE COURT: ALL RIGHT. THANK YOU.

DO YOU WANT TO ADDRESS THAT, MR. JOHNSTON?

MR. JOHNSTON: YES, YOUR HONOR, I DO.

THE ISSUE, AS I SEE IT, BEFORE THE COURT IS WHETHER OR NOT THE SENTENCING COMMISSION IN ENACTING 4B1.4 TOOK INTO CONSIDERATION THE KINDS OF THINGS THAT MY CLIENT WAS CONVICTED FOR.

THE COURT: THAT IS ONE OF THE ISSUES. THE OTHER IS WHETHER I OUGHT TO MAKE A DEPARTURE.

MR. JOHNSTON: WELL, I THINK YOU SHOULD, YOUR HONOR. I THINK IT BECAUSE OF THE THINGS THAT WE HAVE RAISED HERE IN THIS CASE. I DON'T AGREE WITH MR. DIBIAGIO'S ASSESSMENT AT [31] ALL. PLUS, I THINK MY CLIENT IS RELATIVELY YOUNG STILL IN HIS LIFE, AND I DON'T SEE WHY FIFTEEN YEARS – I MEAN, WE ARE NOT EVEN TALKING ABOUT WHETHER OR NOT ARMED CAREER CRIMINAL APPLIES. WE ARE TALKING ABOUT FIFTEEN AND UP NOW. WHY ISN'T FIFTEEN YEARS WITHOUT PAROLE ENOUGH TO PUNISH HIM FOR THE KINDS OF THINGS THAT MR. DIBIAGIO IS TRYING TO ARGUE? MY WHOLE ARGUMENT ABOUT THE ARMED CAREER CRIMINAL ACT IS THAT ONE OF THE REASONS WHY I DON'T THING THEY HAD THE AUTHORITY TO DO WHAT THEY DID IS BECAUSE WE ARE TALKING ABOUT FIFTEEN YEARS IN THIS CASE; WE ARE TALKING ABOUT 26, OR 25, OR 24, WHATEVER HIS RANGE MAY ULTIMATELY BE. I THINK, WHEN YOU ARE TALKING ABOUT THOSE KINDS OF NUMBERS, YOU START LOOKING AT THESE KINDS OF THINGS TO SEE IF THE NATURE OF THESE CONVICTIONS – AND ALL THREE OF THEM WE HAD OBJECTIONS TO, I THOUGHT PRETTY FAIR OBJECTIONS TO, YOUR HONOR.

THE COURT: I AM NOT SAYING THEY'RE NOT FAIR. I AM JUST SAYING THEY WON'T BE CONSIDERED.

MR. JOHNSTON: WELL, I AM SAYING THAT THEY OUGHT TO BE CONSIDERED FOR THOSE REASONS.

THE COURT: THEY WON'T BE CONSIDERED ON THE CONSTITUTIONAL GROUNDS.

MR. JOHNSTON: WHAT WE ARE LOOKING AT HERE AGAIN IS JUST ANOTHER EXAMPLE OF HOW EVERYBODY IS A NUMBER. YOU HAVE THREE OF THESE CONVICTIONS, AND, BINGO, YOU ADD UP TO THIS. YOU LOOK AT THE GUIDELINE, AND IT ADDS UP TO THIS.

[32] THE COURT: THIS IS WHAT THE PEOPLE OF THE UNITED STATES WANT, ISN'T IT? THAT'S WHY YOU SEND THESE PEOPLE TO CONGRESS, TO DO THIS.

MR. JOHNSTON: THAT IS THE BIGGEST EMBARRASSMENT TO ME AS A DEMOCRAT, YOUR HONOR, THAT THE PEOPLE THAT I CONSIDER TO BE LIBERAL, THE DEMOCRATS, ARE THE ONES WHO ARE DOING ALL OF THIS STUFF, BUT I DON'T BELIEVE THAT IS WHAT THE PEOPLE WANT. I DON'T BELIEVE THAT WHEN A PERSON IS FACING TRIAL THEY WANT TO BE A NUMBER.

THE COURT: HAVE YOU LISTENED TO THE CAMPAIGN SPEECHES?

MR. JOHNSTON: DO I LISTEN TO THEM, YOUR HONOR?

THE COURT: YES.

MR. JOHNSTON: RARELY.

THE COURT: WELL, YOU WILL HEAR WHAT THEY HAVE TO SAY ABOUT CRIME. THEY ARE NOT HAPPY WITH IT.

MR. JOHNSTON: I DON'T THINK ANY OF US WOULD BE HAPPY WITH THE KIND OF MOB JUSTICE THAT I THINK MOST AMERICANS WOULD THINK THEY WOULD PREFER UNTIL THEY ARE ACTUALLY FACED WITH IT OR ACTUALLY IN THE COURTROOM. I MEAN, I THINK THAT THE GUIDELINES TAKE AWAY A LOT OF AUTHORITY THAT WE GENERALLY VESTED IN JUDGES TO KEEP THAT ASPECT OF THE MOB—REACTION AND RETRIBUTION OUT OF THE SYSTEM. NOW GIVING CONGRESS THE AUTHORITY TO DO THIS TAKES IT ALL AWAY FROM THE JUDGES, AND I ALWAYS THOUGHT THAT ONE OF THE BEST THINGS [33] ABOUT THE SYSTEM WAS THAT YOU CAN MAKE YOUR APPEAL TO A PERSON AND NOT THE SENSIBILITIES OR LACK THEREOF OF THE COMMUNITY.

THE COURT: WELL, OF COURSE, THE GENESIS OF THIS WHOLE SENTENCING REVOLUTION, AS YOU KNOW, CAME FROM THE LIBERAL MOTIVES OF A FEW JUDGES, ONE IN PARTICULAR, WHO JUST PUT ON A BIG SYMPOSIUM AT YALE, WHO THOUGHT THAT IT WAS CRUEL, THAT SOME JUDGES WERE TOO SEVERE AND, THEREFORE, YOU KNOW, WE OUGHT TO STOP THAT: THAT IS WHY WE ARE HERE NOW. THIS IS THE LAW OF UNINTENDED CONSEQUENCES, MR. JOHNSTON.

ALL RIGHT. ANYTHING ELSE YOU WISH TO BRING UP AT THIS TIME?

MR. JOHNSTON: NO, YOUR HONOR, NOT WITH RESPECT TO THE SENTENCE.

THE COURT: ALL RIGHT. HERE ARE MY FINDINGS WITH REGARD TO THE QUESTION THAT HAS BEEN MADE AS TO DEPARTURE.

I HAVE CONSIDERING THE GROUNDS FOR DEPARTURE RAISED BY THE DEFENSE, AND I THINK THAT I DO HAVE THE POWER TO DEPART ON THE GROUNDS AS STATED IN COUNSEL'S EARLIER LETTER. HOWEVER, PURSUANT TO MY LETTER OF JANUARY 30, PARAGRAPH FIVE, I STILL FIND THAT, EITHER ALONE OR IN COMBINATION, THE BACKGROUND FACTORS DO NOT WARRANT A DOWNWARD DEPARTURE BECAUSE MR. CUSTIS HAS SHOWN A CHRONIC INABILITY TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF THE LAW. HE HAS LIVED ON THE OUTSIDE OF THE LAW PRACTICALLY ALL HIS LIFE, AND IT HAS GOT TO [34] COME TO AN END AT SOME POINT.

FOR THE RECORD, I WILL FIND THAT UNDER SECTION 3553(B), THE SENTENCE COMMISSION DID NOT ADEQUATELY CONSIDER THE QUESTION OF THE NATURE OF THE UNDERLYING CRIMINAL CONDUCT OR OF THE PROCEEDINGS THAT RESULTED IN THE ARMED CAREER CRIMINAL STATUS IN SIMPLY FIXING ONE OR TWO OFFENSE LEVELS FOR ARMED CAREER CRIMINALS, EITHER OF WHICH, GIVEN THE CRIMINAL HISTORY CATEGORY THAT IS LIKELY TO BE THERE, IS WELL ABOVE THE FIFTEEN YEAR MANDATORY MINIMUM. THEREFORE, THE SENTENCING COMMISSION DID NOT ADEQUATELY CONSIDER IT.

THE NEXT POINT IS WHETHER IN THIS CASE IT OUGHT TO MITIGATE THE SENTENCE, AND MY ANSWER TO THAT IS NO, FOR THE SAME REASONS THAT I HAVE GIVEN BEFORE, AND THAT IS THAT THIS INDIVIDUAL HAS SHOWN AN INABILITY TO LIVE WITH IN [sic] THE SYSTEM AND IN THE REQUIREMENTS OF THE LAW, EVEN THOUGH HE HAS BEEN GIVEN NUMEROUS OPPORTUNITIES TO STRAIGHTEN HIMSELF OUT. HE HAS ALWAYS WOUND UP IN COURT AGAIN AND AGAIN AND AGAIN AND AGAIN, AND IT WILL KEEP ON; AND I THINK THAT IN THOSE CIRCUMSTANCES NO DEPARTURE IS GOING TO BE GIVEN.

ALL RIGHT. THE COURT FINDS THE DEFENDANT IS AN ARMED CAREER CRIMINAL UNDER SECTION 824(E). THE QUESTION OF THE OFFENSE LEVEL THERE IS WHETHER IT IS AT 33 OR 34.

DO YOU WISH TO BE HEARD ON THAT?

MR. JOHNSTON: WELL, YOUR HONOR, IF I CAN JUST GET THE GUIDELINE.

[35] THE COURT: 4B1.43A OR B.

MR. JOHNSTON: WELL, I WOULD LIKE 33 YOUR HONOR.

THE COURT: I KNOW YOU WOULD, BUT I THINK IT QUALIFIES BY A PREPONDERANCE OF THE EVIDENCE UNDER 3A AS A 34 BECAUSE AT THE SAME TIME HE HAD DOPE ON HIM, AND THE DEFINITIONS IN 4B1.22 SAYS CONTROLLED SUBSTANCE, WHICH MEANS AN OFFENSE, PROHIBITING MANUFACTURE, IMPORT, EXPORT, OR DISTRIBUTION, OR

POSSESSION WITH INTENT TO MANUFACTURE, IMPORT, EXPORT, OR DISTRIBUTE.

MR. JOHNSTON: HE WAS NOT CONVICTED OF THOSE OFFENSES, YOUR HONOR.

THE COURT: NO, HE WAS NOT CONVICTED OF THEM, BUT THE QUESTION IS WHETHER HE POSSESSED THEM IN CONNECTION WITH, AND THERE DOESN'T HAVE TO BE A CONVICTION OF THOSE THINGS TO BE POSSESSING IN CONNECTION WITH. IT'S JUST BY A PREPONDERANCE, IT SEEMS TO ME. ISN'T THAT RIGHT?

MR. JOHNSTON: NO, I DON'T THINK IT IS RIGHT IF HE IS ACQUITTED OF THOSE CHARGES.

THE COURT: WHAT WAS HE CONVICTED OF HERE?

MR. JOHNSTON: JUST SIMPLE POSSESSION AND BEING A FELON IN POSSESSION.

THE COURT: THAT'S RIGHT. HE WAS JUST CONVICTED OF SIMPLE POSSESSION, WASN'T HE?

DOES THE GOVERNMENT HAVE ANY OBJECTION TO OFFENSE LEVEL 33, THEN, BECAUSE I THINK HE IS RIGHT ABOUT THAT. THERE [36] IS NO EVIDENCE OF DISTRIBUTION HERE.

MR. DIBIAGIO: THAT WOULD BE CORRECT.

THE COURT: ALL RIGHT. OFFENSE LEVEL 33, THEN.

PLEASE, MISS JONES, MAKE SURE THE P.S.I. SO INDICATES, WILL YOU?

MS. JONES: YES, SIR.

THE COURT: ALL RIGHT.

SO, IT'S OFFENSE LEVEL 33 HERE.

CRIMINAL HISTORY CATEGORY IS SIX.

OTHER THAN THE POINTS OF INVALIDITY YOU HAVE RAISED, DO YOU HAVE ANY POINT ON THE CRIMINAL HISTORY CATEGORY COMPUTATION?

MR. JOHNSTON: NO, YOUR HONOR.

THE COURT: ALL RIGHT. CRIMINAL HISTORY CATEGORY SIX, WHICH GIVES A GUIDELINE OF 234 TO 293 MONTHS. ALL RIGHT.

IS THERE ANY GENERAL ALLOCUTION YOU WOULD DESIRE BEFORE I SET THE SENTENCE, MR. JOHNSTON?

MR. JOHNSTON: NO, YOUR HONOR.

THE COURT: MR. CUSTIS, BEFORE I IMPOSE THE SENTENCE IN THIS CASE, THIS IS YOUR OPPORTUNITY TO BRING TO MY ATTENTION ANYTHING AT ALL YOU WISH ME TO CONSIDER IN EXTENUATION OR MITIGATION OF THE OFFENSE OR PENALTY TO BE IMPOSED FOR IT OR ANY OTHER MATTER THAT YOU WISH TO TAKE INTO ACCOUNT. IF THERE IS ANYTHING YOU WISH TO SAY, THIS IS YOUR CHANCE TO DO IT.

[37] THE DEFENDANT: YOUR HONOR, OKAY. NOW, I UNDERSTAND YOUR POINT AND ALSO THE PROSECUTOR'S POINT AS FAR AS THE FACT THAT I HAVE BEN [sic] GIVEN OTHER

CHANCES. OKAY? I HAVE DONE MY BEST WHILE I WAS OUT THERE. IT IS STILL A LOT OF QUESTION THERE, A WHOLE LOT OF QUESTION AS FAR AS THE HONESTY OF THE ARRESTING OFFICERS WHO ARRESTED AND HAD ME CONVICTED, HELPED CON CONVICT ME OF THIS INSTANT OFFENSE HERE.

THE COURT: THAT'S ALL RIGHT. HE CAN SAY ANYTHING HE WANTS TO SAY.

GO AHEAD.

THE DEFENDANT: NOW, JUST FOR THE SAKE OF ARGUMENT, LET'S JUST SAY, OKAY, THESE COPS ARE CRIMINAL. THEY ARE CROOKED. YOU MEAN THAT I SHOULD GET 25 OR 30 YEARS IN PRISON BECAUSE THIS COP WAS CRIMINAL, ARRESTED ME, LIED ON ME, GOT ME CONVICTED? YOU UNDERSTAND? IF YOU WAS TO READ EVEN HIS GRAND JURY TESTIMONY, HE TOLD TWO OR THREE OUT AND OUT BLATANT LIES RIGHT THERE THAT MANIFESTED AT MY TRIAL. OKAY? IF IT WEREN'T FOR HIM PERJURING HIMSELF FROM THE BEGINNING, I WOULDN'T BE STANDING HERE IN THIS FEDERAL COURTROOM.

NOW, WITH ALL OF THIS TO CONSIDER, ISN'T IT A POSSIBILITY THAT THERE IS A LOT MORE TO THIS CASE THAN MEETS THE EYE?

YES, I HAVE DONE TIME. I GOT OUT, AND I TRIED MY BEST. OKAY. I HAD A DRUG PROBLEM. I ADMIT TO THAT FROM THE BEGINNING. BUT HAVING A DRUG PROBLEM AND RUNNING AROUND WITH [38] A GUN IN MY POCKET IS TWO DIFFERENT

THINGS. I NEVER RAN AROUND WITH NO GUN. I JUST WENT TO BUY SOME DRUGS. OKAY? SO, NOW THERE ISN'T A POSSIBILITY – BECAUSE OF THE FACT THAT I HAD PREVIOUSLY BEEN ARRESTED AND SERVED TIME, THERE ISN'T A POSSIBILITY THAT I COULDN'T HAVE REFORMED MYSELF, AT LEAST TO THE LEVEL WHERE I DIDN'T TRY TO COMMIT NO CRIMES WHICH WOULD HURT NOBODY ELSE? BECAUSE I REALLY DIDN'T THINK GOING TO BUY ANY DRUGS FOR MY PERSONAL USE WOULD IN FACT HURT ANYBODY ELSE, AND I CERTAINLY DIDN'T THINK THAT IT WOULD HURT ME LIKE IT IS HURTING ME NOW, AND THAT IS THE BOTTOM LINE TO THIS WHOLE THING.

THAT IS ALL I HAVE TO SAY, YOUR HONOR. I MEAN, THERE IS NOTHING ELSE FOR ME TO SAY.

LIKE I SAID, I HAVE BEEN IN THE WRONG BEFORE. EVERYTHING I HAVE DONE IN THE PAST, IF I ACTUALLY DID IT, I PLED GUILTY TO IT. I TOOK MY PUNISHMENT FOR IT. IF I HAD DONE THIS, I COULD HAVE PLED GUILTY FROM THE BEGINNING WHEN THE PROSECUTOR OFFERED TO DROP THE DRUG CHARGES IF I PLEAD GUILTY TO THE GUN. WHAT WOULD HAVE BEEN THE DIFFERENCE? I WOULD HAVE BEEN IN THE SAME SITUATION I AM IN NOW.

THE COURT: THAT'S RIGHT.

THE DEFENDANT: BUT I DIDN'T DO IT.

I KNEW WHAT WAS GOING TO HAPPEN. IF I GOT ONE COP LYING ON ME, SAYING HE SAW ME COME FROM WHERE THE GUN WAS FOUND, THEN I GOT

ANOTHER COP – AT FIRST I FIGURED THAT [39] MAYBE THE MAN HAD BEEN MISTAKEN, BUT NOW, ONCE I FIND OUT A LOT OF OTHER THINGS, THOSE OTHER THINGS MANIFEST, I AM NOT TOO SURE ABOUT WHETHER IT WAS MISTAKE OR WHETHER IT WAS A BLATANT LIE, BECAUSE EVEN IN STATE COURT, FROM WHAT OFFICER WADE HAS SAID FROM THE BEGINNING, HE COULDN'T HAVE CONVICTED ME FOR A GUN THAT NOBODY EVER SAW UNTIL HE SAW IT IN HIS WAISTBAND.

LIKE I SAY, YOUR HONOR, THAT IS IT. THANK YOU VERY MUCH.

THE COURT: ALL RIGHT SIR.

THE CHARGE OF WHICH HE WAS CONVICTED – RON, WE ARE GOING TO HAVE TO SPECIFY WHAT THE CHARGE WAS, THE LESSER INCLUDED OFFENSE, IN COUNT ONE. IT WASN'T INTENT TO DISTRIBUTE. THE LESSER INCLUDED OFFENSE WAS 844(A). ISN'T THAT RIGHT? I WILL PUT IT DOWN ON HERE.

WHAT IS THE MAXIMUM SENTENCE UNDER 844(A)?

MISS JONES, DID YOU LOOK INTO THAT?

MS. JONES.YES, YOUR HONOR.

THE COURT: WHAT IS THE MAXIMUM SENTENCE UNDER 844(A)? I COULDN'T FIND IT – THERE IS NO (A)(1). IT IS JUST (A). I COULDN'T FIND IT IN YOUR REPORT.

WHAT IS IT, MISS JONES?

MR. DIBIAGIO: YOUR HONOR, I BELIEVE IT IS ONE YEAR.

THE COURT: IT IS A YEAR, ISN'T IT? I THINK THAT IS RIGHT, A YEAR.

[40] ALL RIGHT.

THE DEFENDANT, HAVING BEEN FOUND GUILTY ON THE LESSER INCLUDED OFFENSE AS TO COUNT ONE AND ALSO ON COUNT THREE, IS SENTENCED AS PROVIDED IN PAGES TWO THROUGH THREE OF THIS JUDGMENT PURSUANT TO THE SENTENCING REFORM ACT OF 1984.

THE DEFENDANT HAS BEEN FOUND NOT GUILTY ON COUNT TWO AND DISCHARGED AS TO AS TO THAT COUNT.

IT IS ORDERED THAT THE DEFENDANT SHALL PAY A SPECIAL ASSESSMENT OF $100 FOR COUNTS ONE AND THREE.

ACTUALLY, THAT IS NOT A FELONY, IT IS, THEN? BECAUSE IF IT IS ONLY A YEAR, THAT IS A MISDEMEANOR. WHAT IS THE ASSESSMENT ON A MISDEMEANOR? IT IS $25 ISN'T IT?

MR. SIMS: YES.

THE COURT: ALL RIGHT. AN ASSESSMENT OF $75 FOR COUNTS ONE AND THREE, WHICH SHALL BE DUE TO BE PAID DURING HIS PERIOD OF IMPRISONMENT.

YOUR SOCIAL SECURITY NUMBER IS 216-78-9057. IS THAT RIGHT?

THE DEFENDANT: YES.

THE COURT: BORN ON THE 14TH OF FEBRUARY OF '65. IS THAT RIGHT?

THE DEFENDANT: YES.

THE COURT: WHAT IS YOUR PERMANENT ADDRESS?

THE DEFENDANT: 4006 MAIN AVENUE.

THE COURT: AND WHAT ZONE IS THAT IN?

[41] THE DEFENDANT: 07.

THE COURT: BASED ON THE FINDINGS OF THE COURT IN THIS CASE, THE DEFENDANT WILL BE SENTENCED AT OFFENSE LEVEL 33, CRIMINAL HISTORY CATEGORY NUMBER SIX, AND THE GUIDELINE RANGE THERE IS 235 TO 293.

FRANKLY, I HAVE GOT TO STATE THE REASONS FOR A SENTENCE AT A PARTICULAR POINT IN THE GUIDELINE RANGE, AND I SEE NO REASON AT ALL TO GO ABOVE 235 MONTHS IN THIS CASE. THAT IS ALMOST TWENTY YEARS IMPRISONMENT, AND IT SEEMS TO ME IS CERTAINLY ADEQUATE TO FULFILL ALL OF THE GOALS OF PUNISHMENT AS SET FORTH BY THE CONGRESS IN 3553(A) IN THIS CASE. I THINK ANY HIGHER SENTENCE WOULD BE JUST OUT OF ANY BOUNDS OR PROPORTION.

ALL RIGHT. THE DEFENDANT IS HEREBY COMMITTED TO THE CUSTODY OF THE UNITED STATES BUREAU OF PRISONS TO BE IMPRISONED FOR A TERM OF 235 MONTHS, AS FOLLOWS: 235 MONTHS

AS TO COUNT THREE AND TWELVE MONTHS AS TO COUNT ONE, LESSER INCLUDED OFFENSE, CONCURRENTLY.

THE DEFENDANT IS REMANDED TO THE CUSTODY OF THE UNITED STATES MARSHAL FOR SERVICE OF SENTENCE.

IS THERE A MINIMUM SUPERVISED RELEASE, MISS JONES, IN THIS CASE OR A MAXIMUM OR SOMETHING? BETWEEN THREE AND FIVE YEARS. IS THAT RIGHT?

MR. JOHNSTON: THREE TO FIVE YEARS, YOUR HONOR.

THE COURT: UPON RELEASE FROM IMPRISONMENT, THE [42] DEFENDANT SHALL BE ON SUPERVISED RELEASE FOR A TERM OF THREE YEARS.

WHILE ON SUPERVISED RELEASE, HE WILL NOT COMMIT ANOTHER FEDERAL, STATE, OR LOCAL CRIME, WILL NOT ILLEGALLY POSSESS A CONTROLLED SUBSTANCE, WILL COMPLY WITH THE STANDARD CONDITIONS OF RELEASE SET FORTH ON PAGE THREE OF THE JUDGMENT, AND THE FOLLOWING CONDITION, THAT HE WILL NOT POSSESS A FIREARM OR DESTRUCTIVE DEVICE DURING THE PERIOD OF SUPERVISED RELEASE.

ALL RIGHT. THE COURT DOES NOT IMPOSE ANY FINE OR RESTITUTION IN THIS CASE BECAUSE OF THE DEFENDANT'S OBVIOUS ABILITY TO PAY ANY SUCH.

NOW, BEFORE WE MOVE ON TO THE OTHER MATTERS, MR. CUSTIS, DO YOU UNDERSTAND THAT YOU HAVE A RIGHT TO APPEAL THE CONVICTION AND THE IMPOSED IN THIS CASE?

THE DEFENDANT: YES.

THE COURT: AS TO ALL COUNTS. IF YOU WISH AN APPEAL TO BE FILED, SIMPLY ASK MR. JOHNSON [sic] TO DO SO, AND HE WILL DO SO AT YOUR REQUEST. IF FOR ANY REASON HE SHOULD FAIL OR REFUSE TO DO SO, THEN YOU CAN SIMPLY WRITE TO THE CLERK OF THE COURT WITHIN TEN DAYS, STATING YOUR WISH TO APPEAL FROM THE JUDGMENT AND/OR SENTENCE, AS YOU DESIRE. MAKE SURE IT IS IN WRITING. THERE IS NO FEE BECAUSE YOU HAVE BEEN FOUND TO BE INDIGENT.

DO YOU UNDERSTAND THAT?

[43] THE DEFENDANT: YES, SIR.

THE COURT: COUNSEL, ARE THER [sic] EANY [sic] OBJECTIONS AS TO THE FORM OF THE SENTENCE AS IMPOSED.

MR. JOHNSTON: NO, YOUR HONOR.

THE COURT: ALL RIGHT. NOW LET'S MOVE ON TO THE MOTION FOR NEW TRIAL. DO YOU WISH TO MAKE A MOTION FOR NEW TRIAL, MR. JOHNSTON?

MR. JOHNSTON: YES, YOUR HONOR, PURSUANT TO RULE 33.

THE COURT: YES, SIR. DO YOU HAVE AN OBJECTION?

MR. DIGIAGIO: YOUR HONOR, BEFORE WE GO ON, MAY I INTRODUCE AS GOVERNMENT'S EXHIBIT NUMBER 1 IN CONNECTION WITH THE SENTENCING PHASE THE CERTIFIED COPY OF THE CONVICTION AS REFERRED IN YOUR JANUARY 30TH, 1992 LETTER?

THE COURT: YES. YOU DON'T HAVE ANY OBJECTION TO THAT, DO YOU, MR. JOHNSTON?

MR. JOHNSTON: YES, I OBJECT. IT IS IRRELEVANT.

THE COURT: OVERRULED. PUT IT IN. IT MIGHT HAVE SOMETHING TO DO WITH WHAT HAPPENS ON APPEAL.

ALL RIGHT. NOW, LET'S MOVE ON, THEN TO THE MOTION FOR NEW TRIAL. I WILL HEAR YOU ON THE MOTION FOR NEW TRIAL.

MR. JOHNSTON: THANK YOU, YOUR HONOR.

YOUR HONOR, AS THE COURT KNOWS, IT BECAME KNOWN TO THE DEFENDANT AFTER MY CLIENT'S CONVICTION THAT THERE HAD BEEN AN INVESTIGATION IN THE BALTIMORE CITY POLICE DEPARTMENT, PARTICULARLY IN THE NORTHWESTERN DISTRICT, REGARDING NOT LESS [44] THAN FIVE OFFICERS WHO WORK IN THE NORTHWEST DISTRICT AND INVOLVING NOT LESS THAN THREE SEPARATE INCIDENTS OF PERJURY COMMITTED BY THOSE FIVE OFFICERS.

THE INVESTIGATIONS BEGAN WITH THE JULY 17TH RAID ON WHAT TURNED OUT TO BE A RELATIVE OF THE MAYOR'S. THE MAYOR, AFTER MAKING SOME REQUESTS FOR INVESTIGATION, FOUND AND THE INVESTIGATION BORE FRUIT THAT NICHOLAS CONSTANTINE HAD COMMITTED PERJURY IN A SEARCH WARRANT AFFIDAVIT, THAT HE HAD SWORN THAT SOMETHING HAD BEEN DONE, WHEN IN FACT HE KNEW THAT IT HAD NOT BEEN DONE

THIS WAS BACK IN NOVEMBER, YOUR HONOR, WHEN OFFICER CONSTANTINE WAS INDICTED, WHICH MEANT THERE MUST HAVE BEEN AN INVESTIGATION PRIOR TO NOVEMBER. HE WAS INDICTED, I BELIEVE, NOVEMBER 7TH OF 1991. THE TRIAL IN THIS CASE WAS NOVEMBER 18TH OF 1991.

THE OFFICERS THAT HAVE BEEN INDICTED, THERE ARE FIVE OF THEM, HAVE BEEN INDICTED FOR ACTS THAT OCCURRED WELL IN ADVANCE OF THE DATE OF MY CLIENT'S TRIAL. IN FACT, I BELIEVE OFFICER WADE WAS IN FEBRUARY OF 1991, THE ACT FOR WHICH HE HAS BEEN INDICTED. THAT THERE WAS AN INVESTIGATION ONGOING IN THE DEPARTMENT FOR A LONG TIME PRIOR TO MY CLIENT'S TRIAL IS OBVIOUS.

NOW, I HAVE NOT BEEN PRIVY TO ANY OF THE INFORMATION THAT THE GOVERNMENT HAS BEEN ALLOWED TO INSPECT, BUT, REGARDLESS OF THIS –

[45] THE COURT: I ORDERED THEM TO INSPECT IT, AND I READ THE AFFIDAVIT, AND THE AFFIDAVIT IS ON FILE FOR THE COURT OF APPEALS TO LOOK AT, TOGETHER WITH MATERIAL FROM

THE FILES THAT INDICATES – THE ONLY REASON I AM KEEPING IT HE SEALED IS BECAUSE OF COMITY THAT COULD AFFECT AN ONGOING STATE PROSECUTION. SO, I THINK IT OUGHT TO REMAIN SEALED AT THIS POINT, BUT I HAVE READ IT AND LOOKED AT IT, AND I AM SATISFIED THAT AT LEAST THE MATERIAL THAT HE PUT ON THERE SUPPORTS THAT THERE WAS NO BRADY SITUATION BECAUSE, AS TO THE INVOLVEMENT OF THESE PARTICULAR OFFICERS, THIS DID NOT COME TO LIGHT UNTIL JANUARY OF '92, AS I RECOLLECT.

IS THAT CORRECT, MR. SIMS?

MR. SIMS: THAT IS CORRECT, YOUR HONOR.

MR. JOHNSTON: REGARDLESS OF A POSSIBLE BRADY VIOLATION, YOUR HONOR, WITH RESPECT TO THE NEWLY DISCOVERED EVIDENCE –

THE COURT: WELL, OBVIOUSLY, IT DEEPLY CONCERNS ME, GIVEN THAT EVERYTHING I HEARD IN THIS CASE AND THE FACT THAT IT TURNS ENTIRELY ON CREDIBILITY OF THE ARRESTING OFFICERS, BOTH AS TO THE SUPPRESSION SITUATION AND AS TO THE TRIAL, AND I WANT TO HEAR FROM THE GOVERNMENT WITH REGARD TO THIS, BECAUSE, AS I POINTED OUT IN THAT CASE THAT I CITED TO YOU OF JUDGE BUTLER'S IN 429 F. SUPP., EVEN THOUGH IMPEACHING EVIDENCE IS USUALLY NOT ENOUGH FOR A NEW TRIAL WHERE IT UNDERMINES CONFIDENCE IN THE OUTCOME, IT CERTAINLY CAN BE, AND [46] I WANT TO HEAR FROM THE GOVERNMENT HOW YOU CAN DEFEND

THE RESULT OF THIS TRIAL WITH TWO POLICE OFFICERS WHO ARE UNDER THE INDICTMENT FOR PERJURY IN THE COURSE OF THEIR OFFICIAL DUTIES.

MR. SIMS: WELL, YOUR HONOR, THERE ARE TWO ISSUES THAT WE RAISED IN OUR MOTION, ONE IN TERMS OF THE NEW TRIAL MOTION BEING MADE AT THIS POINT. IT WOULD PROBABLY BE –

THE COURT: WELL, IF HE DOESN'T MAKE IT AT THIS POINT, HE COULD WAIVE IT ANYWAY, BECAUSE YOU HAVE GOT TO ACT SPEEDILY WHEN YOU DISCOVER NEW EVIDENCE, AND IT IS NOT UNTIMELY BECAUSE IT IS NOT SOMETHING HE FOUND OUT WITHIN SEVEN DAYS AFTER THE VERDICT. YOU KNOW, YOU HAVE GOT YOUR TWO YEARS TO ACT, OBVIOUSLY. HE HAS MADE THE MOTION. I THINK THE MOTION IS TIMELY. THE QUESTION OF WHETHER ANY RELIEF OUGHT TO BE GRANTED AT THIS POINT IS ANOTHER MATTER.

MR. SIMS. I THINK THAT IS THE POINT I AM TRYING TO REACH AT THIS STAGE, YOUR HONOR, THAT CERTAINLY THE MOTION IS MADE. WE UNDERSTAND THE COURT'S CONCERN, AND OBVIOUSLY WE WERE QUITE CONCERNED.

THE COURT: HOW COME YOU ALL DIDN'T BRING THIS TO MY ATTENTION EITHER? I SHOULD THINK THAT THE GOVERNMENT WOULD HAVE AN INTEREST IN SHOWING THE INTEGRITY OF ITS PROSECUTION TO BRING TO THE ATTENTION OF THE COURT THE FACT THAT TWO WITNESSES ON WHOSE TESTIMONY DEPENDED A CONVICTION HAVE BEEN INDICTED FOR PERJURY.

[47] MR. SIMS. YOUR HONOR, WE ACTUALLY FOUND THIS OUT BECAUSE WE ALSO READ IT IN THE NEWSPAPER, AS I RECALL.

THE COURT: AND THE CITY POLICE NEVER TOLD YOU ABOUT IT OR THE ATF?

MR. SIMS. NO. AS I UNDERSTAND THE SITUATION, THE INVESTIGATION BEING CONDUCTED BY THE STATE'S ATTORNEY'S OFFICE WAS NEVER EVEN MADE KNOWN –

THE COURT: WHEN DID THE ATF FIND OUT ABOUT THIS?

MR. SIMS. I THINK WE ALL READ IT IN THE PAPER, YOUR HONOR.

THE COURT: WELL, IT IS QUITE SAD WHEN A FEDERAL PROSECUTION IS IS CALLED INTO QUESTION BY AN INDICTMENT OF PERJURY FOR OFFICERS. I MEAN, ONE WOULD HOPE THIS WOULDN'T HAPPEN WITH FEDERAL OFFICERS; BUT, WHEN YOU BUY ONE OF THESE ADOPTED PROSECUTIONS, YOU ARE BUYING A LOAD OF MISCHIEF, AND THIS IS ANOTHER ILLUSTRATION OF WHAT HAPPENS IN THESE THINGS. I MEAN, IT'S VERY, VERY SAD. IT MAKES THE U.S. GOVERNMENT LOOK VERY BAD.

MR. SIMS. I UNDERSTAND THE COURT'S CONCERN, AND OBVIOUSLY WE WERE QUITE CONCERNED ABOUT THIS, AS WELL.

THERE ARE NUMEROUS FEDERAL PROSECUTIONS IN WHICH STATE OFFICERS ARE CALLED AS WITNESSES AND EVEN AS IMPORTANT WITNESSES. IT IS QUITE UNUSUAL FOR ANY OFFICER TO BE

INDICTED FOR PERJURY UNDER THESE CIRCUMSTANCES, AND I DON'T THINK IT CALLS INTO QUESTION WHETHER THESE TYPES OF PROSECUTIONS ARE [48] APPROPRIATE OR PROSECUTIONS WHERE STATE OFFICERS ARE NECESSARY ARE APPROPRIATE.

THE COURT: WELL, MAYBE IT DOESN'T GO THAT BROADLY, BUT IT STILL IS EXTREMELY DISTURBING.

MR. SIMS. IT IS DISTURBING, YOUR HONOR, BUT PART OF OUR BASIS FOR SUGGESTING THAT THE NEW TRIAL MOTION NOT BE GRANTED AT THIS POINT IS THAT, ONE, BASED ON THE NATURE OF THE ALLEGATIONS AGAINST THESE OFFICERS AND ALSO THE FACT THAT THEIR CASE HAS ONLY RECENTLY BEEN INDICTED.

THE COURT: WHAT IS THE SCHEDULE OF PROCEEDINGS IN THIS CASE?

MR. SIMS. MY UNDERSTANDING, YOU HONOR, IS THAT THE ONLY SCHEDULED PROCEEDING AT THIS POINT IS THE ARRAIGNMENT OF THE FIVE OFFICERS THAT WERE INDICTED.

THE COURT: WELL, I CAN'T LET THIS THING HANG THIS THING HANG DEFINITELY.

MR. SIMS. I UNDERSTAND WHAT THE COURT'S CONCERN IS. OUR CONCERN IS THAT THIS IS THE INDICTMENT AGAINST TWO OFFICERS OR FIVE OFFICERS IN CIRCUMSTANCES THAT ARE SUCH THAT THIS MAY WELL NOT EITHER LEGALLY AMOUNT TO PERJURY OR AS A FACTUAL MATTER

NOT BE PERJURY. TO PUT THE OFFICERS AND THE GOVERNMENT IN A POSITION WHERE A NEW TRIAL WOULD BE GRANTED, THESE ARE TWO OBVIOUSLY IMPORTANT WITNESSES. THEY HAVE ONLY BEEN INDICTED, AND THE CHANCES ARE THAT CROSS-EXAMINATION ON THE INDICTMENT ITSELF IS SUBJECT TO BE BROUGHT IN. I THINK IT [49] IS UNFAIR, GIVEN THE CIRCUMSTANCES.

THE COURT: WELL, I THINK THEY WOULD HAVE TO ASSERT THEIR FIFTH AMENDMENT PRIVILEGE. THEN WHAT WE WOULD HAPPEN?

MR. SIMS. I HAVEN'T SPOKEN TO THE OFFICERS. I DON'T KNOW WHAT WOULD HAPPEN ON RETRIAL. I CAN'T REPRESENT THAT. CERTAINLY, THAT WOULD BE A TREMENDOUS CAUSE FOR CONCERN, AND THE PROCEDURAL CIRCUMSTANCES OF THIS CASE –

THE COURT: IT WOULD ALMOST GUARANTEE YOU WOULDN'T GET A CONVICTION. DO YOU THINK A JURY IS GOING TO CONVICT SOMEBODY WHEN THE OFFICERS ON CROSS-EXAMINATION INVOKE THE FIFTH AMENDMENT? THERE'S NO WAY. THERE IS NO WAY.

MR. SIMS. I AM NOT CERTAIN THAT THAT IS WHAT IS GOING TO HAPPEN. I WORK FOR THE FEDERAL GOVERNMENT. I DON'T REPRESENT THESE TWO OFFICERS. I DON'T KNOW WHETHER THEY WOULD ASSERT THE FIFTH AMENDMENT THE OR AGREE TO TESTIFY IN THIS CASE . THAT IS DOWN THE ROAD.

WHAT I AM SUGGESTING IS THIS IS AN INDICTMENT ON PARTICULAR CIRCUMSTANCES OF THE INVESTIGATION THAT ARE COMPLETELY DIVORCED FROM THIS CASE.

THE COURT: THANK YOU.

MR. JOHNSTON, DO YOU WANT TO ADDRESS THE TIME ISSUE HERE?

MR. JOHNSTON: I CERTAINLY DON'T WANT TO HAVE THE COURT RESERVE RULING ON THE MOTION FOR THE NEW TRIAL ON ITS MERITS. SCHEDULING THE TRIAL IS A WHOLE NOTHER MATTER, BUT [50] THE IMPEACHMENT VALUE OF THESE ACTS THAT THESE OFFICERS ARE ALLEGED –

THE COURT: SUPPOSE THEY ARE ACQUITTED? THERE IS NO IMPEACHMENT VALUE.

MR. JOHNSTON: YES, THERE IS, YOUR HONOR.

THE COURT: WHY. HOW CAN YOU RAISE THAT?

MR. JOHNSTON: BECAUSE THEY HAVE BEEN INDICTED. THERE ARE PEOPLE OUT THERE THAT HAVE THE OPINION, EITHER LAY PERSONS OR PEOPLE IN THE POLICE DEPARTMENT HAVE AN OPINION ABOUT THE CHARACTER OR TRUTHFULNESS OR VERACITY OF THESE WITNESSES.

THE COURT: WHAT ARE YOU GOING TO DO, CALL THE GRAND JURORS AS WITNESSES?

MR. JOHNSTON: I AM NOT SUGGESTING TO CALL THE GRAND JURORS.

THE COURT: HOW ARE YOU GOING TO ESTABLISH THIS BY OPINION EVIDENCE?

MR. JOHNSTON: WELL, YOUR HONOR, IF THE SUBPOENAS HAD NOT BEEN QUASHED AND WE COULD INVESTIGATE, REGARDLESS OF WHETHER THE SUBPOENAS HAD BEEN QUASHED, THERE ARE PEOPLE OUT THERE THAT WE ARE ALLOWED TO FOLLOW UP AND INVESTIGATE THESE ALLEGATIONS. WE WILL FIND WITNESSES WHO CAN TESTIFY ABOUT THESE OFFICERS, THEIR OPINION OF REPUTATION AND –

THE COURT: THAT SIMPLY IS IMPEACHING EVIDENCE OF A NATURE THAT IS NOT SUFFICIENT TO WARRANT A NEW TRIAL.

[51] NOW, IF THEY ARE INDICTED AND CONVICTED OF PERJURY, THEN IT SEEMS TO ME THERE CLEARLY IS.

MR. JOHNSTON: YOUR HONOR, UNDER 608(B), WE CAN ALSO ASK THEM THE QUESTION ON CROSS EXAMINATION WHETHER OR NOT THEY DID THIS, REGARDLESS.

THE COURT: YES; AND, IF THERE WERE A NEW TRIAL BEFORE THERE HAD BEEN ANY RESOLUTION OR FINAL JUDGMENT IN CRIMINAL THE PROCEEDINGS, WHICH COULD BE TWO OR THREE YEARS OFF, THEN IT SEEMS TO ME THEY COULD RAISE THE FIFTH AMENDMENT AND THAT WOULD BE UNFAIR TO THE GOVERNMENT, TOO, BECAUSE IT COULD WELL BE THAT THEY WOULD HAVE EVENTUALLY BEEN ACQUITTED.

MR. JOHNSTON: WHAT ABOUT FAIRNESS TO MY CLIENT? HOW DO WE KNOW THAT THEIR CONVICTIONS OR THE LACK THEREFORE ARE GOING TO BE THE RESULT OF JUSTICE AS OPPOSED TO REALIZING THAT IF THEY ARE CONVICTED SOMEBODY GOES FREE BY VIRTUE OF THAT. DON'T YOU THINK IT IS GOING TO IMPACT ON THE STATE'S ATTORNEY OFFICE THE CONSEQUENCES OF FULLY PROSECUTING THESE OFFICERS? HOW DO WE KNOW THAT DOWN THE ROAD THEIR CONVICTION OR LACK WILL HAVE ANYTHING TO DO WITH WHETHER THEY COMMITTED THESE ACTS? MAYBE IT WILL BE A MATTER OF EXPEDIENCY OR A POLITICAL SITUATION.

THE COURT: WELL, IT USUALLY HAS SOMETHING TO DO WITH IT, ONE HOPES. IN A RATIONAL SYSTEM OF JUSTICE, CONVICTION HAS SOMETHING TO DO WITH WHETHER YOU COMMITTED THE ACT.

MR. JOHNSTON: WELL, YOUR HONOR, I DON'T THINK THAT [52] IS FAIR TO MY CLIENT.

THE COURT: OTHERWISE, WHY HAVE TRIALS AT ALL?

MR. JOHNSTON: WHY ARE WE GOING TO LET MY CLIENT'S ABILITY TO CROSS-EXAMINE THESE OFFICERS REST ON POLITICAL DECISIONS MADE BY –

THE COURT: BECAUSE IT COULD WELL BE THAT UNDER RULE 403, TO WHICH 608(B) IS SUBJECT, THAT, IF SOMEBODY HAS BEEN ACQUITTED OF CRIMINAL CONDUCT OR THE CHARGES HAVE BEEN

NOL PROSSED OR STETED, THAT THE DANGER OF UNFAIR PREJUDICE IS OUTWEIGHED BY THE PROBATIVE VALUE.

MR. JOHNSTON: THAT'S EXACTLY MY POINT. THE NOL PROS OR STETED PART HAS NOTHING TO DO WITH WHETHER OR NOT THESE OFFICERS ARE IN FACT GUILTY OF THESE OFFENSES.

THE COURT: SUPPOSE THEY ARE ACQUITTED?

MR. JOHNSTON: WELL, THAT IS A WHOLE DIFFERENT MATTER.

THE COURT: IT IS A WHOLE DIFFERENT MATTER.

MR. JOHNSTON: THE IMPEACHMENT VALUE OF THIS EVIDENCE IS VALUE NOW, AND I WISH I COULD GO INTO THE COURT AND MAKE A RECORD OF ALL OF THE DIFFERENT KINDS OF IMPEACHMENT VALUE THAT THIS STUFF HAS. MY SUBPOENAS WERE QUASHED, AND I CAN'T DO THAT.

THE COURT: I'M GOING TO TELL YOU, YOUR SUBPOENAS WERE QUASHED BECAUSE AT THIS JUNCTURE I DON'T THINK THAT IT IS RELEVANT. YOU ARE DEALING IN THE AREA OF – CERTAINLY, IF THE [53] TRIAL WERE HELD TODAY, YOU COULD IMPEACH. THE QUESTION OF WHETHER A NEW TRIAL OUGHT TO BE GRANTED, THOUGH, IS WHETHER EVENTS TO DATE HAVE SO SHOWN THAT THE COURT'S CONFIDENCE IN THE TRIAL IS UNDERMINDED [sic].

NOW, I WILL HEAR YOUR FOR ABOUT TWO MORE MINUTES, AND THEN I AM GOING TO RULE ON THIS.

MR. JOHNSTON: YOUR HONOR, WHEN YOU MADE YOUR RULING QUASHING MY SUBPOENA, YOUR RULING WAS I THOUGHT A VERY SOUND RULING IN THE SENSE I INTERPRETED THAT RULING, AND THAT RULING SOUNDED TO ME LIKE A MAN WHO IS BALANCING THE CONCERNS OF THE STATE IN INVESTIGATING THESE OFFICERS, MAYBE FINDING MORE OFFICERS, MAYBE FINDING OFFICER HOPSON. THE FAIRNESS TO THE DEFENDANTS IN THAT CASE FOR THE YEAR OR MAYBE LESS THAT THEY MAY DO IN JAIL AND THE FAIRNESS TO MY CLIENT, WHO FACES NOW NINETEEN YEARS IMPRISONMENT WITHOUT PAROLE, AND THE PROPER BALANCING I THOUGHT THE COURT WAS MAKING AT THAT TIME WAS TO QUASH THE SUBPOENAS, LET THAT INVESTIGATION TAKE PLACE, BUT NOT PENALIZE THE DEFENDANT FOR THAT AND GIVE HIM A NEW TRIAL AND LET SKILLED COUNSEL TRY TO MAKE SOMETHING OF THE IMPEACHMENT VALUE OF WHATEVER WE HAVE THERE.

NOW, YOUR HONOR, WE ARE NOT ALLOWED TO GO INTO IT, AND I THINK THE COURT RULED AT THAT TIME, AND IT'S RIGHT HERE IN YOUR OWN RULING, THAT THE DEFENSE CAN CERTAINLY PRESENT A COGENT MOTION FOR NEW TRIAL WITHOUT ACTUAL INSPECTION OF THE RECORDS IN QUESTION.

[54] THE COURT: THAT'S RIGHT.

MR. JOHNSTON: AND YOU WENT ON ABOUT HOW WE COULD DISRUPT A SERIOUS INVESTIGATION. THEN YOU GO ON TO SAY THAT THIS IS DEFINITELY GROUNDS FOR A NEW TRIAL AND THE COURT MOST LIKELY WILL GRANT A NEW TRIAL EVEN THOUGH THE GENERAL RULE THAT IMPEACHMENT EVIDENCE DISCOVERED DOES NOT WARRANT A NEW TRIAL.

YOU TALK IN YOUR OWN RULING ABOUT HOW THIS IS NO MERE IMPEACHING TIDBIT, HOW THIS IS IMPORTANT EVIDENCE; AND I THOUGHT WHEN THE COURT OVERRULED IT THAT YOU SAID A NEW TRIAL MOTION CAN BE BASED UPON THE SIMPLE FACT THAT THE OFFICERS HAVE BEEN INDICTED. YOU SAID THAT: AS HE NOTED ABOVE IN THIS RULING, AND WHAT YOU WERE SAYING THERE, YOUR HONOR, AT THAT POINT IN TIME I THOUGHT WAS FAIR, AND THAT WAS WE KNOW ENOUGH NOW TO GRANT YOU A NEW TRIAL. IF THE STATE WANTS TO QUASH THAT BECAUSE OF THEIR INTERESTS, THAT IS FINE, BUT WE ARE NOT GOING TO PENALIZE THE DEFENDANT FOR IT. NOW YOUR HONOR SEEMS TO BE PROPOSING THAT MY CLIENT'S FAIRNESS BE THE SUBJECT WHATEVER DECISION, POLITICAL OR OTHERWISE, MAY BE MADE BY THE CITY STATE'S ATTORNEY OFFICE, AND THAT IS NOT FAIR. THAT IS JUST NOT FAIR. WE ARE TALKING ABOUT TWO OFFICERS WHO MAY FACE ONLY SUSPENSE.

THE COURT: WELL, IT'S A SAD DAY WHEN THE GOVERNMENT IS OF THE UNITED STATES IS IN

HERE WITH WITNESSES WHO HAVE BEEN INDICTED FOR PERJURY. IT'S A SAD DAY. IT IS A SAD DAY.

[55] ALL RIGHT. THANK YOU, MR. JOHNSTON. HAVE A SEAT.

I AM GOING TO RECESS THIS PROCEEDING. WE HAVE ALREADY DRAGGED ON FOR AN HOUR AND A HALF WITH WHAT SHOULD HAVE BEEN A TWENTY MINUTE SENTENCING, AND IT HAS GOTTEN SO COMPLICATED IT IS BEYOND BELIEF, AND NOW WE HAVE THIS NEW TRIAL ISSUE TO DEAL WITH, AS WELL, AND I AM GOING TO THINK ABOUT THIS FOR A COUPLE OF MINUTES, AND THEN I AM GOING TO GIVE YOU A RULING. I'M GOING TO RULE ON IT ONE WAY OR THE OTHER, AND THEN YOU CAN ALL TAKE IT UP TO RICHMOND AND DO WHAT YOU WANT.

COURT STANDS IN RECESS.

(AFTER RECESS:)

THE COURT: ALL RIGHT, I HAVE CONSIDERED THIS MATER AND I AM GOING TO GRANT A NEW TRIAL TO THIS MAN.

MY CONFIDENCE IN THE OUTCOME OF THIS TRIAL IS SO SEVERELY UNDERMINED BY THE INDICTMENT OF THE TWO KEY WITNESSES FOR PERJURY THAT I CANNOT, IN FAIRNESS AND JUSTICE, LET THIS VERDICT STAND.

AS I COMMENTED, I THINK IT IS A SAD DAY FOR THE GOVERNMENT OF THE UNITED STATES WHEN ITS KEY WITNESSES IN A CASE HAVE BEEN INDICTED FOR PERJURY; AND, AT THIS POINT, NO

MATTER – YOU CAN'T PREDICT HOW THE THING IS GOING TO COME OUT, BUT I THINK CERTAINLY UNDER RULE 608(B) THAT IS EVIDENCE THAT CAN BE USED ON CROSS-EXAMINATION AND CAN BE GONE INTO AND THERE MAY BE A WHOLE LOT OF OTHER EVIDENCE THAT CAN COME OUT [56] ABOUT THE CONDUCT OF THESE OFFICERS; AND, THEREFORE, THIS – THE PRESENCE OF REASONABLE DOUBT MAY BE, IN THE MINDS OF THE JURY, VERY MUCH AFFECTED BY KNOWING ABOUT OTHER THINGS THAT THESE OFFICERS ARE ACCUSED OF OR HAVE IN FACT DONE.

I DON'T KNOW WHAT THEY HAVE DONE, AND I DON'T KNOW ALL OF THE DETAILS OF THESE EVENTS. IT COULD BE THE JURY COULD DECIDE THAT WHAT THEY ARE CHARGED WITH IN THESE INCIDENTS THAT PREDATED THIS TRIAL ARE TRIFLING AND NOT IMPORTANT; AND, FRANKLY, AS A READ THE INDICTMENT, THEY LOOK SORT OF TRIFLING, BUT THEY MAY NOT BE TRIFLING – I MEAN, IN TERMS OF WHAT A JURY WOULD DO.

AND IN THIS CASE, FOR THE REASONS STATED BY JUDGE BUTLER IN HIS DECISION, WHICH REALLY IS ONE OF THE FEW THAT IS ON THIS POINT, I THINK – CERTAINLY THINK A NEW TRIAL IS WARRANTED. THIS IS THE DECISION IN ATKINSON, 429 F. SUPP. 880, EASTERN DISTRICT OF NORTH CAROLINA, 1977.

NOW, I WILL FIND, BASED ON THE AFFIDAVIT OF MR. SIMS, THAT THERE WAS NO BRADY VIOLATION HERE. AND I HAVE LOOKED OVER THE MATERIAL AND I CERTAINLY DON'T SEE ANYTHING THAT EXISTED BEFORE TRIAL FROM THE FILES THAT HAVE BEEN EXAMINED BY MR. SIMS AT MY REQUEST TO INDICATE THAT THERE WAS A BRADY VIOLATION. HOWEVER, OBVIOUSLY, IF I HAD KNOWN NOW WHAT – THEN WHAT I KNOW NOW ABOUT THESE OFFICERS, I PROBABLY WOULD HAVE ALLOWED THE SUBPOENAS OF THEIR POLICE RECORDS, THEIR PERSONNEL RECORDS OR OTHER MATTERS, BUT IT MIGHT NOT HAVE [57] TURNED UP ANYTHING BECAUSE UNDER THE BRADY AFFIDAVIT MR. SIMS PUT IN THERE WASN'T ANYTHING THERE PRIOR TO THE TRIAL, BUT THERE SURE IS NOW; AND, SENTENCING GUIDELINES OR NO SENTENCING GUIDELINES, ARMED CAREER CRIMINAL ACT OR NO ARMED CAREER CRIMINAL ACT, CRIMINAL LAW REVOLUTION OR NO CRIMINAL LAW REVOLUTION, OPERATION TRIGGERLOCK OR NO OPERATION TRIGGERLOCK, THE BASIC RULE IS THAT WE DO HERE WHAT IS FAIR, JUST, AND RIGHT.

IT MAY WELL BE THAT MR. CUSTIS IS A BAD INDIVIDUAL; IT MAY WELL BE THAT MR. CUSTIS IS GUILTY, BUT HE HAS GOT THE RIGHT TO AN EVEN PLAYING FIELD, TO A LEVEL PLAYING FIELD; AND I THINK THAT TO PRESERVE THAT RIGHT A NEW TRIAL HAS TO BE GRANTED HERE IN THE INTEREST OF FAIRNESS AND JUSTICE.

IF YOU LOOK AT WHAT IS HAPPENING OVER IN ENGLAND, IN BRITAIN, RIGHT NOW, BECAUSE OF

POLICE MISCONDUCT IN THE SEVENTIES IN CONNECTION WITH THE I. R. A., WHICH RESULTED IN MANY PEOPLE GOING TO JAIL ON PERJURED POLICE TESTIMONY – I AM NOT SAYING THERE WAS ANY PERJURY HERE. I AM NOT SAYING THAT, IT IS UP TO THE JURY TO DECIDE WHETHER THESE INDIVIDUALS SHOULD BE BELIEVED OR WHETHER THEY TOLD THE TRUTH BEFORE. I DON'T KNOW WHETHER THEY DID OR NOT, BUT WHAT I AM SAYING IS THAT – AND THE REASON I BRING UP THIS ENGLISH OR BRITISH EXAMPLE IS THAT WHAT IS GOING ON THERE IS THAT THE CONFIDENCE OF THE PUBLIC, OF THE BRITISH PUBLIC, IN THE INTEGRITY OF THE JUDICIARY IS WHAT HAS BEEN UNDERMINDED.

[58] THERE HAS BEEN UNDERMINING OF CONFIDENCE CERTAINLY IN THE POLICE DEPARTMENT AND IN THE HOME SECRETARIAT, BUT PEOPLE ARE CALLING FOR TREMENDOUS REFORMS IN THE JUDICIARY, BECAUSE THEY ARE SAYING HOW COULD THE JUSTICE SYSTEM ALLOW SOMETHING LIKE THIS TO HAPPEN; AND, BECAUSE OF THESE THINGS, WE SEE PROBABLY THOUSANDS OF YEARS, OR HUNDREDS OF YEARS, CERTAINLY, OF CONFIDENCE THAT HAD BEEN BUILT UP LIKE BY ACCRETION, SLOWLY OVER HUNDREDS AND HUNDREDS OF YEARS, CONFIDENCE IN THE INTEGRITY OF THE BRITISH JUDICIARY IS NOW GOING RIGHT OUT THE WINDOW WITH THE BATH WATER IN CONNECTION WITH THE PERJURED POLICE TESTIMONY THAT WAS DONE IN AN EFFORT TO GET THE I.R.A. UNDER CONTROL, AND THIS SHOULD NOT HAPPEN IN THIS

COUNTRY. I WILL NOT TOLERATE IT. I WILL NOT TOLERATE EROSION OF PUBLIC CONFIDENCE IN THE JUDICIARY IN THIS COUNTRY, AND I THINK THAT THE FACT THAT THE KEY WITNESSES FOR THE UNITED STATES GOVERNMENT IN THIS CASE HAVE BEEN INDICTED FOR PERJURY IS SO IMPORTANT AND SO SIGNIFICANT THAT IT OUGHT TO RESULT IN A NEW TRIAL IN THIS CASE IN THE INTEREST OF FAIRNESS AND JUSTICE; AND, THEREFORE, I WILL AWARD A NEW TRIAL.

ALL RIGHT. I WILL PREPARE A SIMPLE ORDER IN CHAMBERS THAT AWARDS THE NEW TRIAL AND GRANTS THE MOTION.

NOW, OBVIOUSLY, THIS IS APPEALABLE. IN 1984 THE GOVERNMENT GOT THE RIGHT TO APPEAL A NEW TRIAL; AND, UNLIKE A NEW TRIAL IN A CIVIL CASE, I THINK THE NEW TRIAL APPEAL CAN BE TAKEN BEFORE A NEW TRIAL IS HAD. IS THAT RIGHT?

[59] MR. SIMS: I THINK THAT IS RIGHT.

THE COURT: I THINK IT CAN, BECAUSE THE NEW TRIAL, OBVIOUSLY, SINCE IT IS AN APPEALABLE ORDER, THE FINAL ORDER RULE DOESN'T GOVERN.

IN CIVIL CASES, A NEW TRIAL ORDER IS NOT APPEALABLE UNTIL AFTER THE SECOND TRIAL IS HELD, BUT I THINK IN THIS CASE IT IS APPEALABLE, WHICH MEANS THAT, IF THERE IS A NEW TRIAL – AND I AM CERTAIN THE GOVERNMENT IS GOING TO APPEAL IT. I MEAN, UNLESS I AM SADLY MISTAKEN,

THE GOVERNMENT IS GOING TO APPEAL THIS, AND I CAN UNDERSTAND WHY THEY WOULD APPEAL IT.

SO, THIS IS PROBABLY MEANINGLESS, BUT I AM GOING TO GO AHEAD AND SCHEDULE THE NEW TRIAL ANYWAY WITHIN THE SEVENTY DAYS OF THE SPEEDY TRIAL ACT.

I WILL SCHEDULE IT TENTATIVELY FOR MAY THE 18TH AT 10:00 A.M. RETRIAL OF MR. CUSTIS IS SET FOR MONDAY, MAY THE 18TH, 1992 AT 10:00 A.M..

IS A JURY TRIAL STILL ELECTED?

MR. JOHNSTON: YES, YOUR HONOR.

THE COURT: ALSO WE ARE GOING TO – I WILL REHEAR THE MOTIONS TO SUPPRESS, BECAUSE MY CONFIDENCE IN THE OUTCOME OF THE MOTIONS TO SUPPRESS IS ALSO OBVIOUSLY SHAKEN BY THE FACT THAT THESE INDIVIDUALS HAVE BEEN INDICTED.

DOES THE GOVERNMENT REQUEST THAT THE TRIAL BE HELD BEFORE ANOTHER JUDGE OF THE COURT?

MR. SIMS: I DON'T SEE ANY REASON FOR THAT.

[60] THE COURT: DO YOU, MR. JOHNSTON?

MR. JOHNSTON: NO, YOUR HONOR.

THE COURT: ALL RIGHT. THEN I WILL SCHEDULE IT IN FRONT OF MYSELF.

ALL RIGHT. I WILL ENTER THE ORDER IN CHAMBERS TODAY.

ANYTHING ELSE?

MR. JOHNSTON: NO, YOUR HONOR.

THE COURT: MR. CUSTIS, OF COURSE, IS GOING TO BE HELD IN DETENTION PENDING A NEW TRIAL UNDER 3142. THERE IS NO REASON TO CHANGE THE CONDITIONS OF RELEASE IN THIS CASE.

ALL RIGHT, THEN. THAT IS WHERE THE MATTER STANDS. JUDGMENT WILL BE ENTERED TODAY OR MONDAY AND THE NEW TRIAL ORDER WILL BE ENTERED EITHER TODAY OR MONDAY. THEY WILL BOTH BE ENTERED ON THE SAME DATE FOR THE PURPOSES OF YOUR APPEAL.

I THINK IT WOULD BE – CERTAINLY BECAUSE OF THE NATURE OF THE QUESTIONS RAISED, COUNSEL MIGHT WISH TO SUGGEST TO THE FOURTH CIRCUIT THAT THEY EXPEDITE THE APPEAL IN THIS CASE FOR A LOT OF REASONS, BUT I WILL LEAVE THAT UP TO YOU.

YES, SIR?

MR. JOHNSTON: YOUR HONOR, I WOULD LIKE TO MAKE A FORMAL REQUEST FOR A BOND OR A REHEARING ON MY CLIENT'S RELEASE CONDITIONS AT THIS TIME.

THE COURT: THE MOTION IS DENIED. IN VIEW OF THE NATURE OF THE OFFENSE, HIS BACKGROUND AND CONDUCT, UNDER [61] SECTION 3142

AND 3143(B) THIS MAN SHOULD REMAIN DETAINED PENDING A NEW TRIAL.

MR. JOHNSTON: THANK YOU, YOUR HONOR.

THE COURT: ALL RIGHT. OBVIOUSLY, ANY DETENTION TIME HE HAS HAD FROM THE BEGINNING UNTIL, IF HE EVENTUALLY IS CONVICTED WITH A JUDGMENT THAT STANDS, WILL BE CREDITABLE ENTIRELY AGAINST HIS SENTENCE.

ALL RIGHT, COURT STANDS IN RECESS.

(THEREUPON, AT 11:20 O'CLOCK A.M., AN ADJOURNMENT WAS HAD IN THIS MATTER.)

* * *

AO 245 S(Rev. 4/90) Sheet 1 – Judgment in a Criminal Case

United States District Court
___ District of MARYLAND.

[Filed March 9, 1992]

UNITED STATES OF AMERICA

V.

DARREN J. CUSTIS

(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: S-91-0334
Thoms M. DiBiagio, AUSA
Tyler Johnston, AFPD
Defendant's Attorney

THE DEFENDANT:

_ pleaded guilty to count(s) _____.

X was found guilty on count(s) *1 (one), 3 (three) after a plea of not guilty. *Guilty as to the lesser included offense in Count 1.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21:841(a)(1)	Poss. with intent to distr. a quant. of a mixt. of Cocaine		*1
18:922(g)(1)	Poss. of a Firearm by a Convicted Felon		3

*Guilty as to the lesser included offense in Ct. 1, 21:844(a) Poss. of CDS.

The defendant is sentenced as provided in pages 2 through 3 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

X The defendant has been found not guilty on count(s) 2 (Two) and is discharged as to such count(s).

_ Count(s) _____ (is)(are) dismissed on the motion of the United States.

X It is ordered that the defendant shall pay a special assessment of $75.00, for count(s) 1 & 3, which shall be due _ immediately X as follows: To be paid during his period of imprisonment.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

___FILED ___ENTERED
___LODGED ___RECEIVED

MAR 9 1992

AT BALTIMORE
CLERK U.S. DISTRICT COURT
DISTRICT OF MARYLAND
CRIMINAL DEPUTY

Defendant's Soc. Sec. No.: 216-78-9057

Defendant's Date of Birth: 2/14/65

Defendant's Mailing Address:

c/o Baltimore City Jail
401 E. Eager St., Balto., Md. 21202

Defendant's Residence Address:

4006 Maine Avenue
Baltimore, Maryland 21207

March 6, 1992
Date of Imposition of Sentence

/s/ Illegible
Signature of Judicial Officer

FREDERIC N. SMALKIN, JUDGE U.S. DIST. CT.
Name & Title of Judicial Officer

March 9th, 1992 @ 1015 a.m.
Date

AO 245 S (3/88) Sheet 2 – Imprisonment

Defendant: DARREN J. CUSTIS Judgment – Page 2 of 3
Case Number: S-91-0334

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of Two hundred Thirty-five (235) months as follows:.

Two hundred Thirty-five (235) months as to Count 3, and Twelve (12) months as to Count I (lesser included offense), concurrently.

_ The Court makes the following recommendations to the Bureau of Prisons:

X The defendant is remanded the custody of the United States Marshal.

_ The defendant shall surrender to the United States Marshal for this district,

_ at ____ a.m.
_ at ____ p.m. on _____.

_ as notified by the Marshal.

_ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

_ before 2 p.m. on _____.

_ as notified by the United States Marshal.

_ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on ___ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

AO 245 S (Rev. 4/90) Sheet 3 – Supervised Release

Defendant: DARREN J. CUSTIS Judgment – Page 3 of 3
Case Number: S-91-0334

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Three (3) Years.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

_ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

_ The Defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

X The defendant shall not possess a firearm or destructive device.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendants shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer the defendant shall notify third parties of risks that may be occasioned by the defendants criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendants compliance with such notification requirement.

United States District Court.
D. Maryland.

UNITED STATES of America

v.

Darren CUSTIS.

Crim. No. S 91-0334.

March 16, 1992.

Defendant was found guilty of possessing cocaine and being a felon in possession of a firearm. At sentencing, the defendant sought to challenge prior convictions and made a motion for a new trial. The District Court, Smalkin, J., held that: (1) the defendant, who was being sentenced as an armed career criminal, could not collaterally attack prior convictions on the ground that he did not receive effective assistance of counsel, and (2) the interest of justice required granting a new trial after the arresting officers who had testified against the defendant were indicated for perjury in unrelated cases.

Motion for new trial granted.

MEMORANDUM OPINION

~~SMALKIN, District~~ Judge.

This criminal case under the Armed Career Criminal Act, 18 U.S.C. § 924(e) is before the Court on issues regarding the sentencing of Mr. Darren Custis and his motion for new trial.

First, Mr. Custis has challenged the constitutional validity of his prior convictions, arguing, *inter alia*, that he was denied effective assistance of counsel, as set forth

in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), as to two of his prior convictions. Mr. Custis contends that these convictions cannot be used to sentence him as a thrice-convicted armed career criminal. Thus, before addressing the arguments on the merits as to the various points raised by counsel going to the validity of the prior convictions, this Court examined the circumstances in which collateral attack should be allowed on prior convictions under 18 U.S.C. § 924(e). From its analysis, this Court now concludes that, with one narrow possible exception, collateral attacks on prior convictions should not be entertained at sentencing, for reasons that will be explained herein.

This opinion will also address the defendant's motion for new trial, based upon newly discovered evidence concerning the veracity of two Government witnesses. Specifically, two of the police officers who testified at the suppression hearing and at trial, and whose testimony constituted the principal evidence in support of Mr. Custis' conviction for possession of a firearm, have been indicted for perjury arising in the course of their work in an unrelated case. The indictments were filed after the trial in this case, but before sentencing. The defendant argues that this new information concerning the officers seriously undermines confidence in the jury's guilty verdict on the firearms count in the present case. The Government, in turn, rejects the notion that a new trial should be granted upon these grounds. Because this Court finds that the law and the equities in this case support the grant of a new trial, defendants new trial motion will be granted, as explained further below.

Factual Background

Mr. Custis was tried by jury in November of 1991 on a three-count indictment charging him with (1) possessing, with the intent to distribute, cocaine, (2) carrying a firearm in connection with a drug trafficking offense, and (3) possessing a firearm after having been convicted of a crime punishable by a term of imprisonment exceeding one year. At trial, three Baltimore City police officers testified on behalf of the Government. Two of the officers, Christopher Wade and John Mohr, originally arrested the defendant on state narcotics and firearms charges. As part of "Operation Triggerlock," a federal prosecution was undertaken pursuant to 18 U.S.C. §§ 922 and 924. A third officer testified regarding the defendant's purported admissions concerning the firearm. During the trial, Mr. Custis testified on his own behalf, admitting to possession of a small amount of cocaine for his personal use, but denying ownership and/or possession of the gun. After a three day trial, the defendant was convicted of the lesser-included offense of possession of cocaine, as well as the felon-in-possession of a firearm charge, in violation of 18 U.S.C. § 922(g) and § 924(e)(1), but was acquitted of the charge of carrying a firearm during the commission of a drug trafficking crime.

In February 1992, as the result of an investigation into an unrelated, earlier case conducted by the Baltimore City State's Attorney's Office. Officers Wade and Mohr were indicted for misdemeanor perjury, arising from allegedly false statements in applications for search

warrants[1]. Subsequent to the indictment, defense counsel sought to obtain by subpoena all records regarding the state's investigation of these officers, as well as the officers' personnel records.[2] The purpose of the subpoenas was to determine whether or not those records contained information relevant to a motion for new trial. This Court subsequently quashed the subpoenas, pursuant to an Order requiring the prosecutor to submit an affidavit stating that, upon review, the records contained no *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), exculpatory information (including impeachment information) extant before the trial of Mr. Custis. The Court received the requisite affidavit prior to the sentencing hearing, and finds, on the basis of that affidavit and its attachments, that there was no violation of *Brady*[3] in the present case.

Collateral Attack on Prior Convictions Used to Calculate Armed Career Criminal Status

The Government here requests application of the Armed Career Criminal enhancement of 18 U.S.C. § 924(e) to Mr. Custis. The defendant must have been

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[1] Perjury, although a misdeameanor under Maryland's common law classification of offenses, is punishable by 10 years imprisonment. Md. Ann.Code of 1957 art. 27, § 439 (1992).

[2] Prior to trial, the defendant had also moved *ex parte* for subpoenas for the police officers personnel records. Those motions were denied, on the ground that the defendant had presented no particularized showing justifying the issuance of those subpoenas.

[3] No information was contained in the files requested by defense counsel prior to trial that would have been exculpatory to the defendant under *Brady*.

convicted of three prior violent felonies to trigger the enhancement, which raises the penalty for the felon-in-possession of a firearm charge under § 922(g) from a maximum of ten years to a minimum of fifteen years, with a maximum of life. 18 U.S.C. § 924(e)(1). Under U.S.S.G. § 4B1.4, the minimum possible guideline sentence is 188 months. Unlike the statutory scheme for enhancement of sentences in drug cases, the Armed Career Criminal Act provides no statutory right to challenge prior convictions relied upon by the Government for enhancement. *Compare* 18 U.S.C. § 924(e) *with* 21 U.S.C. § 851. Thus, the only relevant question is the extent to which any other statute, the Constitution itself, or case law gives the defendant such a right.

The only statute conceivably relevant is 18 U.S.C. § 3661, which provides simply that the Court may consider any relevant information at sentencing. That statute does little to shed light upon the present situation.

The Constitution, as interpreted by the Supreme Court, appears to prohibit use of prior convictions to enhance sentences only where the convictions are void because the defendant was deprived of the opportunity to retain counsel, or, being indigent, was deprived of the opportunity to have counsel appointed. In other words, the conviction cannot be used to enhance only if it was obtained in violation of the rule in *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). *See United States v. Tucker*, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972); *Burgett v. Texas*, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967). (For reasons that follow, even this narrow prohibition may not apply in § 924(e) cases.)

This Court knows of no binding authority on the point from the United Sates Court of Appeals for the Fourth Circuit. Other circuits have addressed the issue of collateral attack upon prior convictions at sentencing and have allowed defendants to challenge prior convictions on constitutional grounds other than deprivation of the right to counsel, without specifically addressing the origin and nature of the "right" to raise the challenge, but simply allowing it to proceed. *See, e.g., United States v. Day*, 949 F.2d 973, 980-81 (8th Cir.1991). This Court's analysis of *Day* and the cases collected therein, though, leads to the conclusion that, to the extent the cases have extended the rule of *Tucker* and *Burgett* to entertain collateral attacks in cases not involving the frank deprivation of the right to any representation by counsel, they are unsound.

For example, the passage from *Tucker*, 404 U.S. at 448-49, 92 S.Ct. at 592-93, relied upon in *Day*, 949 F.2d at 981, simply does not extend to guilty pleas in which counsel has incompetently performed; rather, *Tucker* concerned itself only with defendants who had been cut off from any right to counsel at all. A guilty plea that can be attacked on ineffective representation grounds is very different from a situation where the defendant never was afforded the right to see a lawyer at all, but was nonetheless convicted. It is only the latter situation that is so fundamentally unfair that a resulting conviction cannot be used for enhancement later under *Tucker*. *See United States v. Graves*, 554 F.2d 65, 82 (3d Cir. 1977), *cited with approval in Grandison v. Warden*, 580 F.2d 1231, 1240-41 (4th Cir. 1978), *cert. denied*, 440 U.S. 918, 99 S.Ct. 1239, 59 L.Ed.2d 469 (1979).

Furthermore, and most importantly, the decision in *Lewis v. United States*, 445 U.S. 55, 100 S.Ct. 915, 63 L.Ed.2d 198 (1980), should be read as foreclosing *any* collateral attack, whether before conviction on the § 924(e) underlying gun offense or at sentencing for it, on a predicate conviction, even where the predicate conviction could otherwise be challenged under *Tucker* and *Burgett*. Although *Lewis* did not directly involve § 924(e), it construed a gun control statute (since repealed) essentially *in pari materia* with § 924(e)'s base offense (18 U.S.C. § 922(g)), *viz.*, 18 U.S.C.App. former § 1202(a). If, as it appears, a conviction void under *Tucker* could be used as a predicate for convicting someone of the substantive firearms offense under *Lewis*, *a fortiori* it can be considered at sentencing on that offense, immune from collateral attack. This Court recognizes that *Lewis*, 445 U.S. at 67, 88 S.Ct. at 922, distinguished *Burgett* but that distinction is neither logically supportable nor persuasive. If the "void" prior conviction is "reliable" enough to support indictment and conviction, it is logically "reliable" enough to be a predicate for an enhanced sentence.

Additionally, this Court's basis for precluding collateral attack at sentencing (on grounds other than, possibly, total deprivation of counsel) includes the persuasive arguments made by Judge Wilkinson in his dissent in *United States v. Jones*, 907 F.2d 456 (4th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 683, 112 L.Ed.2d 675 (1991). Judge Wilkinson's cogent dissent need not be reiterated here save to point out that, if the scope of collateral review of state court convictions in a federal sentencing proceeding extends to any and all constitutional flaws, then the sentencing court will most likely be conducting a

plenary collateral review of up to three predicate convictions in every sentencing under § 924(e), without any state court post-conviction record, and without the usual constraints on collateral review, such as waiver, bypass, cause, prejudice, and exhaustion. *See, e.g., Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). Such a situation is folly, for the reasons stated by Judge Wilkinson in dissent in *Jones*. 907 F.2d at 470-84.

Finally, a word about *Jones* itself. *Jones* is not binding authority in this case, because it involved only construction and application of a (since repealed) provision of the Sentencing Guidelines, and it did not announce a supervisory or constitutional rule of general application in federal sentencings; neither does this Court consider *Jones* persuasive authority in this situation, for reasons amply stated above.

Thus, because defense counsel cannot establish that Mr. Custis, in his prior convictions, was denied the right to be represented by counsel (in fact, he was so represented), there is no occasion for any collateral review of those convictions at all during the sentencing proceedings. This Court is not, for reasons stated above, concerned with "ineffective representation" claims under the Sixth Amendment. Fourth Amendment claims, or claims of any sort other than the outright deprivation of the right to be represented under *Gideon*. Even if a predicate conviction was completely uncounseled, it is the opinion of the Court that *Lewis* would still bar collateral attack upon it, but that is a question upon which judgment need not be rendered in this case.

Motion for New Trial

Federal Criminal Rule 33 delineates the standard for a motion for new trial and provides, in pertinent part, that "[t]he court on motion of a defendant may grant a new trial to the defendant if required in the interest of justice."

The Government, in its opposition to defendant's motion, correctly points out the general rule in this Circuit that new evidence going to the credibility of witnesses normally does not justify a new trial. *See, e.g., United States v. Stockton,* 788 F.2d 210, 220 (4th Cir.), *cert. denied,* 479 U.S. 840, 107 S.Ct. 147, 93 L.Ed.2d 89 (1986). The present case, however, goes well beyond the normal one, where some impeaching tidbit is turned up after trial. Indeed, this case is much closer to *United States v. Atkinson,* 429 F.Supp. 880 (E.D.N.C.1977). There, the court noted:

> Newly discovered evidence that merely goes to impeach the credibility of a prosecution witness does not ordinarily warrant the granting of a new trial. . . . but in some circumstances the newly discovered evidence, although impeaching[,] is sufficiently important in the ascertainment of the truth and in the interests of justice that a new trial should be ordered.

Id. at 885 (citations omitted). In the present case, this Court's confidence in the outcome of this trial is so severely undermined by the indictment of the two key witnesses for perjury that, in fairness and justice, the verdict cannot stand.

Officers Wade and Mohr were the arresting officers in the present case; the jury's belief in their testimony regarding Mr. Custis' possession of the firearm was, in the Court's opinion, essential to a finding of guilt. Of course, during the new trial, the defendant cannot introduce evidence of the officers alleged perjury under Fed.R.Evid. 609 unless and until the officers have actually been convicted of that offense. Under Fed.R.Evid. 608(b), however, the underlying circumstances would be open to cross-examination, subject, of course, to Rule 403 and Fifth Amendment constraints. In the discretion of this Court, the full extent of the officers misconduct, if any[4], could be addressed during cross-examination. The presence of reasonable doubt in the minds of the jury may be very much affected by knowledge of the conduct of these officers, and a different verdict may result. *See Atkinson,* 429 F.Supp. at 887. The Court has considered that another officer testified as to allegedly incriminating oral statements made by the defendant the morning after his arrest, before he had seen a magistrate, and after he had been held in custody all night. This questioning violated a general order of the Police Department, and the whole testimony of that officer is such that it does little to repair the Court's shaken faith in the integrity of the verdict.

It is a sad day when the government's key law enforcement witnesses in a criminal case stand indicated for perjury. While it may be true that the defendant is in fact guilty, our system of justice is designed to insure him the

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[4] Of course, the Court does not purport to have detailed knowledge of either the factual basis of the indictments or whether the charges are well-grounded in fact.

right to a fair trial, where the jury knows all the relevant facts, especially when the credibility of arresting officers is at issue. In order to preserve that right, a new trial must be granted here in the interests of fairness and justice.[5]

For the reasons outlined above, an order will be entered separately, *granting* defendant's motion for new trial.

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[5] The Court is especially cognizant of the decrease in public confidence in the judiciary of England occasioned by recent revelations of police perjury during the 1970's, resulting from attempts to control the Irish Republican Army ("I.R.A."). This crisis of confidence in the independence and integrity of the English courts has led to demands for radical reform of the very mother of all common law courts. Trust in the English judiciary that had been built up by accretion – slowly over hundreds of years – is now going right out the window due to suspicion of police perjury. This court cannot and will not tolerate even the hint of a like erosion of public confidence in the judiciary of this country. Sentencing Guidelines or no Sentencing Guidelines. Armed Career Criminal Act or no Armed Career Criminal Act, War on Drugs or No War on Drugs, Operation Triggerlock or no Operation Triggerlock, the basic principle underlying this Court's judgments must be to do that which is fair, just, and right.

United States Court of Appeals.
Fourth Circuit.

UNITED STATES of America.
Plaintiff-Appellant.

v.

Darren J. CUSTIS. Defendant-Appellee.

UNITED STATES of America.
Plaintiff-Appellee.

v.

Darren J. CUSTIS. Defendant-Appellant.

Nos. 92-5211. 92-5212.

Argued Dec. 4, 1992.

Decided March 22, 1993.

As Amended April 6, 1993.

Order Denying Rehearing and Rehearing En Banc April 30, 1993.

After defendant's conviction for possession of firearm and possession of cocaine, the United States District Court for the District of Maryland. Frederic Nelson Smalkin, J., 786 F.Supp. 533, granted new trial, and government appealed. Defendant cross-appealed sentence enhancement. The Court of Appeals, Wilkinson, Circuit Judge, held that: (1) subsequent indictment of police officer witnesses for perjury did not entitle defendant to new trial; (2) trial court could refuse to entertain constitutional challenges to predicate state convictions for sentencing as armed career criminal; and (3) attempted breaking and entering was "violent felony" for sentence enhancement purposes.

Affirmed in part, reversed in part, and remanded with instructions.

Before RUSSELL and WILKINSON, Circuit Judges, and MERHIGE, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

OPINION

WILKINSON, Circuit Judge:

In this case, Darren Custis claims (1) that he is entitled to a new trial on the basis of newly discovered impeaching evidence: (2) that he is entitled to have the constitutionality of several predicate state convictions considered in his federal sentencing proceeding; and (3) that his prior conviction for attempted breaking and entering should not have been defined as a violent felony for purposes of the sentencing enhancement under 18 U.S.C. § 924(e). For the reasons that follow, we reverse the district court's granting of a new trial and remand this case with instructions to reinstate the judgment of conviction. We find no error, however, in that court's treatment of the defendant's predicate state convictions, nor in its determination that defendant was eligible for sentence enhancement as an armed career criminal. We thus affirm the sentence imposed upon defendant.

I.

Darren Custis was arrested on July 1, 1991 by Baltimore City Police Officers Christopher Wade and John Mohr. Pursuant to "Operation Triggerlock," a federal effort to crack down on the use of firearms by convicted felons. Custis was indicted by a federal grand jury on

three counts: (1) possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1); (2) use of a firearm in connection with a drug trafficking offense in violation of 18 U.S.C. § 924(c); and (3) possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). The government gave notice that it would seek an enhanced penalty for the section 922(g)(1) offense under 18 U.S.C. § 924(e)(1), which provides for a minimum fifteen-year sentence for defendants who have three prior convictions for a violent felony or a serious drug offense. The notice listed state convictions for burglary, attempted burglary, and robbery as predicate offenses for the sentence enhancement.

At trial, three Baltimore City Police Officers testified on behalf of the government; the arresting officers. Christopher Wade and John Mohr, and an officer who interviewed Custis the morning after his arrest, Louis Hopson. Wade testified that at around 5:00 P.M. on July 1, he and Mohr approached the intersection of Springhill Avenue and Towanda, an area known to be the site of extensive drug dealing. Four or five individuals were standing on the corner in front of a convenience store, the Springhill Market. As the officers approached, one of the individuals called out "5-0," a warning that police officers were nearby. Custis went into the Springhill Market, and the officers followed.

Wade testified that he heard a "loud thump" just before he entered the store. As he entered, Custis was coming up from a crouched position between two video machines. Wade ordered Custis to stop and told Mohr, who was entering behind him, to hold Custis. Wade then investigated the area where Custis had been standing and

found a .38 caliber Smith & Wesson revolver. The officers then arrested Custis. As he was being arrested, Custis dropped a small bag of cocaine and said "OK, you got it." Wade then looked around the video machines, where he found eighteen additional bags of cocaine. Custis asked Wade for what he was being arrested, and Wade told him that he was being arrested for possessing cocaine and a handgun. According to Wade, Custis responded. "I will take the cocaine charges but I'm not taking the gun charge." Officer Mohr largely corroborated Wade's testimony.

Officer Hopson testified that he interviewed Custis the morning after his arrest. According to Hopson, Custis initially denied that the gun and drugs were his, but he later admitted that the gun was his and that he worked as an "enforcer" for a drug dealer named "Easy." Hopson did not take a written statement from Custis.

Custis testified on his own behalf. He admitted purchasing the one bag of cocaine in his possession when he was arrested, but denied possessing the gun or the remaining eighteen bags of cocaine. Custis claimed that he had dropped the one bag of cocaine and was picking it up when Wade stopped him. Custis acknowledged that he told Wade he would take the drug charge but not the gun charge. Custis claimed, however, that he meant only the one bag of cocaine that he dropped while being arrested. Custis also denied telling Hopson that the gun was his or that he worked as an "enforcer."

The jury found Custis not guilty of possession with intent to distribute and not guilty of use of a firearm during a drug offense, but found him guilty of possession

of a firearm and simple possession of cocaine, a lesser included offense of the charge of possession with intent to distribute cocaine.

After trial, but before sentencing, Officers Wade and Mohr were indicted in state court for perjury in securing a search warrant in an unrelated case. That indictment alleged that the officers had falsely stated that a substance suspected to be cocaine had been submitted to the Evidence Control Section of the Baltimore City Police Department for chemical analysis. The evidence had not been submitted until after the warrants had been obtained and executed. Based on this indictment. Custis moved for a new trial. The district court deferred ruling on this motion until the sentencing hearing.

At the sentencing hearing, the government moved to have Custis's sentence enhanced under the Armed Career Criminal Act. 18 U.S.C. § 924(e), based on the prior convictions included in the notice of sentence enhancement. In response, Custis claimed that two of his prior convictions had been unconstitutionally obtained. He argued that his counsel for his 1985 burglary conviction was unconstitutionally ineffective and that his guilty plea was not knowing and intelligent. Custis also alleged that the 1989 conviction violated due process because he was not adequately advised of his rights before entering a plea. Custis further claimed that the 1989 conviction was for attempted breaking and entering rather than attempted burglary and thus was not a violent felony. The district court declined to hear Custis's arguments that two of his prior convictions had been unconstitutionally obtained, and found that all three convictions were for violent felonies, thus making him eligible for the sentence

enhancement under section 924(e)(1). *United States v. Custis*, 786 F.Supp. 533, 537 (D.Md.1992).

After determining Custis's sentence, the district court heard his motion for a new trial based on newly discovered evidence. Fed.R.Crim.P. 33. The motion was based on the perjury indictments of Wade and Mohr. Finding that the indictments sufficiently undercut the credibility of those officers so as to justify a new trial, the district court granted Custis's motion. 786 F.Supp. at 538.

Subsequent to the district court's grant of the new trial, however, the state entered a *nolle prosequi* (equivalent to a dismissal without prejudice) in the Circuit Court of Baltimore City dismissing all charges against Wade and Mohr. The government then filed a motion with the district court to reconsider its grant of a new trial, but because the government had already appealed that motion to this court, the district court concluded that it lacked jurisdiction over the government's motion.

We have before us now the government's appeal of the district court's grant of a new trial and Custis's cross-appeal of his sentence enhancement under section 924(e). We address these questions in turn.

II.

The district court granted Custis's motion for a new trial on the basis of the indictments of Mohr and Wade for perjury in an unrelated case. The standard for granting a new trial is well established in this circuit:

> (a) the evidence must be, in fact, newly discovered, i.e., discovered since the trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) the evidence relied on must not be merely cumulative or impeaching; (d) it must be material to the issues involved; and (e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal.

United States v. Bales, 813 F.2d 1289, 1295 (4th Cir.1987) (quoting *Mills v. United States*, 281 F.2d 736, 738 (4th Cir.1960) (citations omitted)). On its face, the evidence offered by Custis fails to meet this standard – it is "merely impeaching." This circuit has emphasized that new evidence going only to the credibility of a witness does not generally warrant the granting of a new trial. *United States v. Stockton*, 788 F.2d 210, 220 (4th Cir.1986) (citing *United States v. Williams*, 415 F.2d 232, 233-34 (4th Cir.1969)).

While we have found no exception in this circuit to the general rule that a motion for a new trial requires a defendant to establish *each* of the five elements, *see United States v. Chavis*, 880 F.2d 788, 793 (4th Cir.1989), we need not rule that there can never be such an exception. There may be an exceptional "rare case" that would justify granting a new trial solely on the basis of newly discovered impeachment evidence. *See United States v. Taglia*, 922 F.2d 413, 415-16 (7th Cir.1991) (noting possible exception, but finding requirements for exception not satisfied). The exceptional circumstances identified by the Seventh Circuit in *Taglia* were, however, quite narrow: "If the government's case rested entirely on the uncorroborated testimony of a single witness who was discovered after trial to be utterly unworthy of being believed

because he had lied consistently in a string of previous cases, the district judge would have the power to grant a new trial in order to prevent an innocent person from being convicted." *Id.* at 415. This case does not fall into that narrow category.

The state proceeding against Mohr and Wade involved an unrelated case, with issues that had no bearing on those at Custis's trial. Although perjured testimony is a matter of serious concern – and is especially repugnant when committed by an officer of the state – we are not prepared simply to presume these officers guilty of criminal misconduct. The district court made no factual findings concerning the conduct specified in the indictments and admitted that it lacked "detailed knowledge of either the factual basis of the indictments or whether the charges are well-grounded in fact." 786 F.Supp. at 538 n. 4. The charges against the officers thus remain mere allegations, inadmissible under Fed.R.Evid. 609, *see United States v. Dennis*, 625 F.2d 782, 798 (8th Cir.1980), although defendant contends the underlying circumstances might prove to be admissible during cross-examination under Fed.R.Evid. 608(b). *See United States v. Leake*, 642 F.2d 715, 718-19 (4th Cir.1981).[1] In addition, all

[1] The admissibility of this evidence seems problematic. There has never been any allegation in the unrelated case that the officers tampered with the evidence, failed to submit that evidence to the Evidence Control Section, or falsely represented the results of chemical analysis. Rather, the officers were charged with securing the search warrant before submitting the evidence for analysis. If the defendant raised this conduct on cross-examination, the government argues that it would be entitled to show in turn that the misstatements were inadvertent or

of the charges against the officers were dismissed after this appeal was taken, a factor which came too late for the district court to consider because it lacked jurisdiction. We are thus confronted on appeal with charges that are both unproven and unconnected to this case. It would not be appropriate to set aside the jury's verdict on such a basis.

The Second Circuit has emphasized that motions for a new trial based on impeaching evidence discovered after trial should be granted "only with great caution and in the most extraordinary circumstances." *United States v. Sanchez*, 969 F.2d 1409, 1414 (2d Cir.1992) (citation omitted). In order to grant such a motion, "[t]here must be a real concern that an innocent person may have been convicted." *Id.* (footnote omitted). Such a concern is not present here. The testimony of Officer Hopson, who was not named in the indictments, is illustrative. His testimony recounting Custis's confession strongly supported the testimony of Wade and Mohr – and the jury's conclusion that Custis possessed the gun. In addition, Custis's own testimony of the events at the Springhill Market was largely consistent with that of the officers. Custis admitted that he had gone into the store with the cocaine, that he was crouched down picking up the cocaine when Officer Wade stopped him, that Officer Wade searched

immaterial, and to offer evidence of the officers character. Custis's new trial might thus be sidetracked by a mini-trial on the allegations in the officers indictment. Admissibility under Rule 608(b) is subject to the balancing test of Rule 403, *see* Fed.R.Evid. 608 advisory committee's note, which requires that the probative value of the evidence not be substantially outweighed by the prospect of confusion or delay.

behind the video machines after stopping him, and that he told the officers that he would take the drug charge but not the gun charge. He differed with the officers only on the ultimate question of whether he possessed the gun and the eighteen bags of cocaine. The jury acquitted Custis of the intent to distribute charge, leaving only the question of the possession of the gun. The officers and Custis essentially agreed on the sequence of events leading up to Custis's arrest, and Custis's proximity to where the gun was found. Given these facts, we cannot say that the indictment was the sort of new evidence that "would probably produce an acquittal." *See Bales*, 813 F.2d at 1295. We conclude, therefore, that Custis has not established an exception to the general rule that the subsequent discovery of impeaching evidence does not justify a new trial.

III.

The district court enhanced Custis's sentence for his section 922(g) conviction under the Armed Career Criminal Act. 18 U.S.C. § 924(e)(1), because it found that he had three prior violent felony convictions. Custis claims that the district court erred when it refused to consider the constitutional validity of the challenged predicate convictions, one of which he claims was obtained in violation of his right to effective assistance of counsel, *see Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and two of which he claims were obtained without a knowing plea of guilt. *See Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

The district court declined to take evidence on the validity of these convictions. Initially, the court reasoned that *Burgett v. Texas*, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967), and *United States v. Tucker*, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972), held that predicate convictions obtained in violation of the right to counsel recognized in *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), cannot be used to enhance a sentence. The court then assured itself that Custis had been represented by counsel in his prior convictions and, thus, that there had been no violation of *Gideon*.

The fact that the court acted scrupulously in determining that Custis's right to counsel had been observed, however, did not oblige it to take evidence on Custis's three remaining claims. The *Gideon* violations at issue in *Burgett* and *Tucker* are different in kind from other constitutional errors, including those asserted by Custis here. When a defendant has been deprived of counsel, he has lost his ability to assert all his other constitutional rights, either because he is ignorant of those rights or because he lacks the background and experience to press them effectively. *Johnson v. Zerbst*, 304 U.S. 458, 465, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938).

Absent counsel, the judicial system has no assurance that the prior conviction reliably establishes the defendant's guilt. *See Linkletter v. Walker*, 381 U.S. 618, 639 n. 20, 85 S.Ct. 1731, 1743 n. 20, 14 L.Ed.2d 601 (1965). Without the reliability, even the federalism concerns that ordinarily counsel deference by federal courts to the judgment of state courts must give way. *See Tucker*, 404 U.S. at 448, 92 S.Ct. at 592. In recognizing the duty of district courts to entertain claims of *Gideon* violations in federal

sentencing proceedings, we note that those claims will ordinarily lend themselves to facial review from the state court documents offered by the government to establish the conviction. The corresponding burden on courts and litigants should thus not be a heavy one. *See United States v. Jones*, 977 F.2d 105, 108 (4th Cir.1992) (*Jones II*) (uncounseled state court conviction is "prime example" of one "whose invalidity appears from available state court records.").

The same cannot be said, however, of the other claims pressed by Custis in his sentencing proceeding. Permitting defendants to challenge generally the constitutional validity of predicate convictions would place a substantial burden both on the prosecutors who will be forced to defend the predicate convictions used in sentence enhancement, and on the district judges who will be forced to hear those challenges. In this case, Custis raised no less than three separate constitutional challenges, all of them fact-intensive, to the validity of his prior convictions, which were several years old and which were from the state courts of Maryland. Requiring district courts to entertain such "first instance challenges to prior state convictions" poses a risk of unduly delaying and protracting the entire sentencing process. *Jones II*, 977 F.2d at 108-09. Even when the defendant's constitutional attack has no merit, establishing the validity of convictions that may be both geographically and temporarily distant presents considerable practical difficulties. Many of the challenges predicate convictions will be from state courts, and the procedures of those courts are likely to be unfamiliar to court and counsel. *See Loper v. Beto*, 405 U.S.

473, 500, 92 S.Ct. 1014, 1027, 31 L.Ed.2d 374 (1972) (Rehnquist, J., dissenting). This unfamiliarity will be compounded by the fact that the attorneys of the state that convicted the defendant will not be there to defend that state's procedures. *Jones II*, 977 F.2d at 109. Moreover, the "inadequacy or unavailability of state court records and witnesses" from multiple or far-flung jurisdictions may further complicate the process. *Id.* Beyond these practical difficulties, permitting collateral attacks on predicate state convictions in federal sentencing proceedings impairs the values both of comity and federalism. It is true that in a federal sentencing proceeding the state is not asserting a direct interest in the validity of its conviction, but any "challenge to the validity of a state conviction implicitly questions in at least some part the integrity of the state's judicial process." *United States v. Gaylor*, 828 F.2d 253, 255 (4th Cir.1987). A final judgment of conviction thus commands respect, in whatever forum and for whatever purposes it has come under challenge. The admonition that "[f]ederal courts are not forums in which to relitigate state trials," *Barefoot v. Estelle*, 463 U.S. 880, 887, 103 S.Ct. 3383, 3392, 77 L.Ed.2d 1090 (1983), is not one that is limited to federal habeas corpus proceedings. In federal habeas corpus, Congress has at least provided a forum for the collateral review of state convictions. In federal sentencing proceedings, by contrast, the statutory mandate for reviewing predicate state convictions is far murkier.[2] The application of "the usual

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[2] Congress has not specifically directed the federal courts to examine the validity of predicate convictions in sentencing proceedings. Nothing in 18 U.S.C. § 3661, which permits federal courts to consider any information concerning "the background, character,

constraints on collateral review, such as waiver, bypass, cause, prejudice, and exhaustion" is, as the district court recognized, more problematic, even assuming that the presence of a procedural bar could be readily ascertained and asserted. 786 F.Supp. at 537. Given that federal

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and conduct" of a defendant in sentencing, requires courts to entertain constitutional challenges to predicate convictions. *See United States v. Jones*, 907 F.2d 456, 466-67 (4th Cir.1990) (*Jones I*). Moreover, that statute is far less detailed than the federal habeas corpus procedures specified under 28 U.S.C. § 2254.

The Sentencing Guidelines also send conflicting signals on the propriety of entertaining constitutional challenges to predicate convictions. *Compare* U.S.S.G. § 4A1.2, comment. (n. 6) ("[S]entences resulting from convictions that a defendant shows to have been *previously ruled constitutionally invalid* are not to be counted.") (emphasis added) *with* U.S.S.G. § 4A1.2, comment. (backg'd) ("The Commission leaves for court determination the issue of whether a defendant may collaterally attack at sentencing a prior conviction."). Not surprisingly, the courts have reached conflicting results. *Compare United States v. Jakobetz*, 955 F.2d 786, 805 (2d Cir.1992) (courts have discretion to entertain challenges) *with United States v. Hewitt*, 942 F.2d 1270, 1276 (8th Cir.1991) (sentencing courts may only entertain challenges to already invalidated convictions). Even those courts that have allowed district courts to entertain attacks on predicate convictions have emphasized that they are not required to do so, and that considerations of finality and federalism counsel restraint in doing so. *See United States v. French*, 974 F.2d 687, 701 (6th Cir.1992). Finally, the district court concluded that constitutional challenges to predicate convictions under the Armed Career Criminal Act were precluded by the Supreme Court's decision in *Lewis v. United States*, 445 U.S. 55, 100 S.Ct. 915, 63 L.Ed.2d 198 (1980). In that case, the Court held that collateral challenges were not permitted under the predecessor statute to the substantive offense under which Custis was convicted. 18 U.S.C. § 922(g). Given our disposition of this case, we need not consider the applicability of *Lewis* to Congress's 1984 amendment adding the sentencing enhancement provisions of 18 U.S.C. § 924(e).

sentencing proceedings are not the preferred forums for the review of state convictions, we have cautioned district courts that where a defendant has failed to attack his conviction on direct review or in a habeas corpus proceedings, his "failure to have made the attempt will bespeak a recognized lack of basis for doing so, thus raising in question the basis now claimed for making the attempt in an even more attenuated collateral setting." *Jones II*. 977 F.2d at 109.

For these reasons, we think that district courts are obliged to hear constitutional challenges to predicate state convictions in federal sentencing proceedings only when prejudice can be presumed from the alleged constitutional violation, regardless of the facts of the particular case; and when the right asserted is so fundamental that its violation would undercut confidence in the guilt of the defendant. *Cf. Rose v. Clark*, 478 U.S. 570, 577-79, 106 S.Ct. 3101, 3105-07, 92 L.Ed.2d 460 (1986) (citing introduction of coerced confession, complete denial of right to counsel, adjudication by biased judge, and direction of guilty verdict by court as constitutional violations where prejudice can be presumed). *But see Arizona v. Fulminante*, ___ U.S. ___, ___-___, 111 S.Ct. 1246, 1263-66, 113 L.Ed.2d 302 (1991) (applying harmless error analysis to introduction of coerced confession).

We now apply this test to the district court's resolution of Custis's claims. Custis claims that he was deprived of effective assistance of counsel during the proceedings leading up to his 1985 burglary conviction. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to make out a claim of ineffective assistance of counsel, however, a defendant

must show that counsel's errors *prejudiced* his defense, "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687, 104 S.Ct. at 2064. *See also Perry v. Leeke*, 488 U.S. 272, 278-80, 109 S.Ct. 594, 599-600, 102 L.Ed.2d 624 (1989) (distinguishing *Strickland* claims requiring showing of prejudice from denial of counsel claims in which prejudice is presumed). Finding prejudice from counsel's alleged errors necessarily entails a fact-intensive inquiry, requiring extensive reference to the record in the original state proceeding. *Strickland*, 466 U.S. at 695, 104 S.Ct. at 2069 ("[A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury."). The court in *Jones II* recognized this problem and pointed to ineffective assistance of counsel claims as "notoriously" fact-specific, and "difficult of proof under any circumstances." 977 F.2d at 111.

Custis also claims that two of his convictions were obtained without a knowing plea of guilt. *See Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). While prejudice to the defendant can be presumed on direct appeal when the record does not affirmatively demonstrate that the defendant's plea of guilt was knowing, *see id.* at 244, 89 S.Ct. at 1713, this presumption does not carry over when a defendant attacks the intelligence of his plea collaterally. "On collateral review, we think it defies logic to presume from the mere unavailability of a transcript . . . that the defendant was not advised of his rights." *Parke v. Raley*, ___ U.S. ___, ___, 113 S.Ct. 517, 524, 121 L.Ed.2d 391 (1992). *See also United States v. Timmrick*, 441 U.S. 780, 99 S.Ct. 2085, 60 L.Ed.2d 634 (1979) (absent

showing of prejudice, Fed.R.Crim.P. 11 violation not cognizable in proceedings under 28 U.S.C. § 2255). When a defendant is represented by counsel when making his guilty plea, that plea is presumed valid when later attached in a habeas corpus proceeding. *Marshall v. Lonberger*, 459 U.S. 422, 437, 103 S.Ct. 843, 852, 74 L.Ed.2d 646 (1983). In order to rebut that strong presumption of validity, the defendant must make a factual showing that his plea of guilt was not voluntary and intelligent. The appropriate forum for such a fact-intensive inquiry will typically be a state collateral proceeding or federal habeas corpus, not a sentencing hearing for a separate offense far removed from the original conviction.

We conclude, therefore, that the district court did not err in declining to entertain Custis's constitutional challenge to the effectiveness of his counsel and to the validity of his guilty pleas. Those alleged violations did not carry with them the same presumption of prejudice that uncounseled pleas and convictions do. The multiple violations alleged by Custis could only have been established after fact-intensive investigations into state proceedings that are best undertaken in a different setting. Of course, if Custis is successful in making "a state or federal collateral attack upon the state sentence" during a habeas petition, for example, he may seek to revise any federal sentence in which the state conviction "was a factor." *Jones II*, 977 F.2d at 110 (citation omitted). No constitutional or statutory provision, however, obliges a federal sentencing court to entertain such challenges in the first instance.

IV.

Finally, Custis contends that his 1989 conviction in Maryland for attempted breaking and entering does not qualify as a violent felony for purposes of the sentencing enhancement in 18 U.S.C. § 924(e).[3] Custis contends that under Maryland law, attempted breaking and entering encompasses conduct such as lying in wait or reconnoitering the location of the crime. According to Custis, such conduct does not present "a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii), and thus his attempted breaking and entering conviction should not count as a violent felony for sentencing.

We disagree. The Supreme Court has instructed that the need for uniform sentencing under section 924(e) requires "a formal categorical approach, looking only to the statutory definition of the prior offenses, and not to the particular facts underlying those convictions." *Taylor v. United States*, 495 U.S. 575, 600, 110 S.Ct. 2143, 2159, 109 L.Ed.2d 607 (1990). In applying such a categorical approach, we think that courts must necessarily make common-sense judgments about whether a given offense proscribes generic conduct with the potential for serious physical injury to another. The Maryland crime of which Custis was convicted includes as an element that the

[3] While this appeal was pending, the Circuit Court of Baltimore County entered an order deleting from the court file for Custis's 1989 conviction all references to "attempted burglary" and substituting the words "attempted breaking and entering." Custis filed a motion to supplement the record on appeal to reflect this order and we granted Custis's motion on January 22, 1993.

breaking and entering be into "the dwelling house of another." Md. Ann.Code art. 27, § 31A. *See also Warfield v. State*, 315 Md. 474, 554 A.2d 1238, 1249 (1989) (§ 31A intended to prohibit breaking and entering into "another person's home"). Such a building is likely to be occupied, thus creating a substantial risk of confrontation. *Compare United States v. Headspeth*, 852 F.2d 753, 758-59 (4th Cir.1988) ("storehouse breaking", Md. Ann.Code art. 27, § 32, held not to present a threat by its very nature because crime generally involved unoccupied buildings).

In most cases, attempted breaking and entering will be charged when a defendant has been interrupted in the course of illegally entering a home. Interrupting an intruder while breaking into a home involves a risk of confrontation nearly as great as finding him inside the house. *United States v. O'Brien*, 972 F.2d 47, 52 (3d Cir.1992). We hold therefore that attempted breaking and entering "presents a serious potential risk of physical injury to another" and thus constitutes a violent felony for purposes of section 924(e)(2)(B)(ii). *Accord United States v. Payne*, 966 F.2d 4, 8 (1st Cir.1992) ("[R]isk of injury arises, not from the completion of the break-in, but rather from the possibility that some innocent party may appear on the scene while the break-in is occurring."). *See also United States v. Lane*, 909 F.2d 895, 903 (6th Cir.1990) (attempted burglary). *But see United States v. Strahl*, 958 F.2d 980, 986 (10th Cir.1992) (holding that attempted burglary does not qualify as a violent felony for section 924(e)); *United States v. Martinez*, 954 F.2d 1050, 1054 (5th Cir.1992) (same).

V.

For the reasons given above, the case is remanded to the district court with directions to sentence defendant under 18 U.S.C. § 924(e) as an armed career criminal.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS.

ORDER

Appellee/cross-appellant's petition for rehearing and suggestion for rehearing en banc were submitted to this Court.

In a requested poll of the Court on the suggestion for rehearing en banc. Chief Judge Ervin and Judges Hall, Phillips, and Murnaghan voted to grant rehearing en banc; and Judges Russell, Widener, Wilkinson, Wilkins, Niemeyer, Hamilton, Luttig, and Williams voted to deny rehearing en banc.

This panel considered the petition for rehearing and is of the opinion that it should be denied. In denying rehearing and affirming the sentence imposed by the district court, the panel does not wish to be construed as condoning the district court's treatment of this circuit's precedent. The district court ruling preceded this circuit's decision in *Jones II* and the district court was thus without the benefit of its guidance. Regrettably, however, in the court [sic] of its discussion, the district court attempted improperly to reject the majority opinion in *Jones I*, and to draw upon the dissenting opinion in that case as authority for its position, 786 F.Supp. at 536-37. It should not need to be remarked that it is the opinion of the panel

majority that binds and governs district courts within this circuit.

As the panel considered the petition for rehearing and is of the opinion that it should be denied, and as the majority of active circuit judges voted to deny rehearing en banc.

It is ADJUDGED and ORDERED that the petition for rehearing and suggestion for rehearing en banc are denied.

Entered at the direction of Judge Wilkinson, with the concurrence of Judge Russell and Judge Merhige (SUSDJ, ED/VA).

SUPREME COURT OF THE UNITED STATES

No. 93-5209

Darren J. Custis,
Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Fourth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Question 1 presented by the petition.

October 12, 1993

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(6)

Supreme Court, U.S.
FILED
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No. 93-5209

In The

Supreme Court of the United States

October Term, 1993

DARREN J. CUSTIS

Petitioner,

v.

UNITED STATES

Respondent.

On Writ Of Certiorari to the United States Court Of Appeals for the Fourth Circuit

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QUESTION PRESENTED

Whether a defendant may challenge, in a federal sentencing proceeding, the constitutional validity of prior convictions offered by the government for sentencing enhancement under 18 U.S.C § 924(e).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	9
ARGUMENT	12
I. CONSTITUTIONALLY INVALID CONVICTIONS CANNOT BE A BASIS FOR SENTENCING ENHANCEMENT UNDER 18 U.S.C. SECTION 924(e)	12
A. Decisions of This Court and Eight Circuits Prohibit Use of Unconstitutional Prior Convictions to Enhance Punishment	12
B. Congress Has Not Limited Judicial Consideration of Constitutional Challenges to Prior Convictions Offered for Sentencing Enhancement Under Section 924(e)	16
C. The Fourth Circuit's Test Undermines the Integrity of Federal Sentencing by Arbitrarily Forbidding Judicial Review of Some Constitutional Violations While Permitting Review of Others	24
II. ECONOMY OF JUDICIAL RESOURCES AND THE COMITY CONCERNS RELIED ON BY THE FOURTH CIRCUIT FAIL TO SUPPORT LIMITATION OF REVIEW	31

TABLE OF CONTENTS – Continued

	Page
A. Recognition of Constitutional Defects Should Not Depend upon the Degree of Factual Inquiry Required to Review a Claim	31
B. Principles of Comity and Federalism Do Not Weigh in Favor of Sharply Limiting the Sentencing Court's Power to Review the Constitutionality of Prior Convictions	33
C. Federal Courts Have Developed Procedures for Efficient Resolution of Constitutional Challenges to Prior Convictions	38
CONCLUSION	42
APPENDIX:	
U.S. Const. amend. V	1a
U.S. Const. amend. VI	1a
U.S. Const. amend. XIV	1a
18 U.S.C. § 921(a)(20)	1a
18 U.S.C. § 922(g)	2a
18 U.S.C. § 924(e)	2a

TABLE OF AUTHORITIES

Page

CASES:

Albernaz v. United States, 450 U.S. 333 (1981) 18

Boykin v. Alabama, 395 U.S. 238 (1969)..... *passim*

Brady v. United States, 397 U.S. 742 (1970)..... 30

Brown v. United States, 610 F.2d 672 (9th Cir. 1980) 19

Burgett v. Texas, 389 U.S. 109 (1967)..... *passim*

Cannon v. Univ. of Chicago, 441 U.S. 677 (1979) 18

Cuyler v. Sullivan, 446 U.S. 335 (1980)..... 28

Dickerson v. New Banner Inst., Inc., 460 U.S. 103 (1983) 22, 23

Fitzpatrick v. Wainwright, 800 F.2d 1057 (11th Cir. 1986)..... 32

Gideon v. Wainwright, 372 U.S. 335 (1963)..... *passim*

Gill v. Turner, 443 F.2d 1064 (10th Cir. 1971)..... 30

Greene v. United States, 880 F.2d 1299 (11th Cir. 1989), *cert. denied*, 494 U.S. 1018 (1990)..... 14

Henderson v. Morgan, 426 U.S. 637 (1976) 30

Hill v. Lockhart, 474 U.S. 52 (1985) 29

Jackson v. Virginia, 443 U.S. 307 (1979)..... 25

Johnson v. Zerbst, 304 U.S. 458 (1938)..... 26

Kimmelman v. Morrison, 477 U.S. 365 (1986)..26, 27, 29, 37

Lassiter v. Turner, 423 F.2d 897 (4th Cir.), *cert. denied*, 400 U.S. 852 (1970)..... 31

TABLE OF AUTHORITIES – Continued

Page

Lewis v. United States, 445 U.S. 55 (1980) 26

Martinez v. United States, 464 F.2d 1289 (10th Cir. 1972)..... 19

McCarthy v. United States, 394 U.S. 459 (1969) 30

McKaskle v. Wiggins, 465 U.S. 168 (1984)..... 25

McMann v. Richardson, 397 U.S. 759 (1970)..... 27

McMannis v. State, 311 Md. 534, 536 A.2d 652 (1988) 34, 35, 36

Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353 (1982) 18

Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 474 U.S. 494 (1986)..... 18

Mistretta v. United States, 488 U.S. 361 (1989)..... 18

Morse v. Texas, 691 F.2d 770 (5th Cir. 1982)..... 19

North Carolina v. Alford, 400 U.S. 25 (1970) 30

Parke v. Raley, 113 S. Ct. 517 (1992) 34, 35, 39

Peete v. Rose, 381 F. Supp. 1167 (W.D. Tenn. 1974) 31

Profitt v. Waldron, 831 F.2d 1245 (5th Cir. 1987)..... 27

Regan v. Time, Inc., 468 U.S. 641 (1984)..... 18

Riggins v. Nevada, 112 S. Ct. 1810 (1992)..... 25

Roberts v. United States, 445 U.S. 552 (1980)..... 40

Rose v. Clark, 478 U.S. 570 (1986).....24, 25

Stevenson v. State, 37 Md. App. 635, 378 A.2d 209 (1977) 5

TABLE OF AUTHORITIES – Continued

Page

Strickland v. Washington, 466 U.S. 668 (1984) 28, 29

Stubbs v. Mancusi, 442 F.2d 561 (2d Cir. 1971), *rev'd* 408 U.S. 204 (1972) 19

Sullivan v. Louisiana, 113 S. Ct. 2078 (1993) 25

Thrall v. Wolfe, 503 F.2d 313 (7th Cir. 1974), *cert. denied*, 420 U.S. 972 (1975) 23

United States v. Aloi, ___ F.3d ___, 1993 Westlaw 435270 (6th Cir. 1993). 40

United States v. Belanger, 936 F.2d 916 (7th Cir. 1991) 32

United States v. Bradshaw, 999 F.2d 798 (4th Cir. 1993), *petition for cert. filed*, (October 21, 1993) (No. 93-6448) 24

United States v. Brown, 991 F.2d 1162 (3rd Cir. 1993) 14

United States v. Byrd, 995 F.2d 536 (4th Cir. 1993), *petition for cert. filed*, (Oct. 18, 1993) (No. 93-6385) 15

United States v. Canales, 960 F.2d 1311 (5th Cir. 1992) 15

United States v. Clark, 445 U.S. 23 (1980) 18

United States v. Clawson, 831 F.2d 909 (9th Cir. 1987), *cert. denied*, 488 U.S. 923 (1988). 13

United States v. Cronic, 466 U.S. 648 (1984) 28

United States v. Day, 949 F.2d 973 (8th Cir. 1991). 13, 39

United States v. Dickerson, 901 F.2d 579 (7th Cir. 1990) 40

TABLE OF AUTHORITIES – Continued

Page

United States v. Gallman, 907 F.2d 639 (7th Cir. 1990), *cert. denied*, 449 U.S. 908 (1991). 13, 39

United States v. Henry, 933 F.2d 553 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1703 (1992). 14

United States v. Hewitt, 942 F.2d 1270 (8th Cir. 1991) 15

United States v. Hope, 906 F.2d 254 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1640 (1991). 33, 40

United States v. Isaacs, ___ F.3d ___, 1993 Westlaw 210537 (1st Cir. 1993), *petition for reh'g filed*, (Jul. 12, 1993) 15

United States v. Jakobetz, 955 F.2d 786 (2d Cir.), *cert. denied*, 113 S. Ct. 104 (1992) 15

United States v. Martinez, 413 F.2d 61 (7th Cir. 1969) 19

United States v. McGlocklin, ___ F.3d ___ , 62 U.S.L.W. 2230 (6th Cir. 1993). 15

United States v. Mulloy, 3 F.3d 1337 (9th Cir. 1993) .. 14, 39

United States v. Paleo, ___ F.3d ___, 1992 Westlaw 545126 (order den. rehr'g) (1st Cir. Sept. 14, 1992) 18

United States v. Paleo, 967 F.2d 7 (1st Cir. 1992) 13, 17, 34, 36, 39

United States v. Patrone, 948 F.2d 813 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 2953 (1992). 33

United States v. Petty, 798 F.2d 1157 (8th Cir. 1986), *vacated*, 481 U.S. 1034 (1987), *on remand*, 828 F.2d 2 (8th Cir. 1987) 20

TABLE OF AUTHORITIES – Continued

Page

United States v. Preston, 910 F.2d 81 (3rd Cir. 1990), *cert. denied*, 498 U.S. 1103 (1991) 13

United States v. Roman, 989 F.2d 1117 (11th Cir. 1993), *petition for cert. filed*, (Jul. 29, 1993) (No. 93-5464) 15

United States v. Ruo, 943 F.2d 1274 (11th Cir. 1991)..14, 39

United States v. Scarborough, 777 F.2d 175 (4th Cir 1985) 38

United States v. Stewart, 977 F.2d 81 (3rd Cir. 1992), *cert. denied*, 113 S. Ct. 1433 (1993)..... 14, 39, 40

United States v. Swanson, 943 F.2d 1070 (9th Cir. 1991) 27

United States v. Taylor, 882 F.2d 1018 (6th Cir. 1989), *cert. denied*, 496 U.S. 907 (1990).....13, 39

United States v. Tucker, 404 U.S. 443 (1972) ..... *passim*

United States v. Vea-Gonzales, 999 F.2d 1326 (9th Cir. 1993) 14

United States v. White, 890 F.2d 1033 (8th Cir. 1989) 14

United States v. Wicks, 995 F.2d 964 (10th Cir. 1993), *cert. denied*, (Nov. 15, 1993)(No. 93-6303) 14, 39

Vasquez v. Hillery, 474 U.S. 254 (1986) 25

Waller v. Georgia, 467 U.S. 39 (1984) 25

Yanes v. State, 52 Md. App. 150, 448 A.2d 359 (1982) 5

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES:

U.S. Const. amend VI..... 27

Armed Career Criminal Act of 1984, Pub. L. No. 98-473, Tit. II, §§ 1801-1803, 98 Stat. 2185 ..... *passim*

Firearms Owners' Protection Act, Pub. L. No. 99-308, §§ 101-110, 100 Stat. 449-461 (1986) 16, 21, 22

18 U.S.C. § 921(a)(20)..... 21, 22, 23

18 U.S.C. § 922(g) 2, 16, 23, 37

18 U.S.C. § 924(a)(2)..... 5

18 U.S.C. § 924(c) 2

18 U.S.C. § 924(e) ..... *passim*

18 U.S.C. App. §§ 1201-1203 (repealed).....16, 22

18 U.S.C. App. § 1202 (repealed)..... 14, 16, 22

18 U.S.C. §§ 3575-3576..... 19

18 U.S.C. § 3661..... 40

18 U.S.C. § 5021 (repealed) 22

21 U.S.C. § 841(a)(1)..... 2

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2254..... 36

28 U.S.C. § 2255..... 36

Fed. R. Crim. P. 11 41

Fed. R. Crim. P. 32(a)(1); (c)(3)..... 40

TABLE OF AUTHORITIES – Continued

Page

Md. Ann. Code art. 27, section 645A(a) 36

United States Sentencing Commission, Guidelines Manual, § 4B1.4(a)(Nov. 1990) 5, 6

OTHER AUTHORITIES:

134 Cong. Rec. S17, 370 (daily ed. Nov. 10, 1988) 20

134 Cong. Rec. S7449 (daily ed. June 8, 1988) 20

Dep't of Justice Manual, Vol. 9, § 63.515 (1989-2 Supp.)..... 14

S. Rep. No. 583, 98th Cong., 2d Sess. (1984)..... 23

S. Rep. No. 617, 91st Cong., 1st Sess. (1969)..... 19

OPINIONS BELOW

The opinion of the court of appeals and order denying rehearing are reported at 988 F.2d 1355 (reprinted at J.A. 135-155). The opinion of the district court (J.A. 124-134) is reported at 786 F. Supp. 533 (D. Md. 1992).

JURISDICTION

The judgment of the Fourth Circuit was entered on March 22, 1993. J.A. 135. A timely Petition for Rehearing was denied on April 30, 1993, with four judges voting to hear the case in banc. J.A. 154-155. The petition for a writ of certiorari was filed on July 15, 1993, and granted on October 12, 1993, limited to Question 1 presented by the petition. J.A. 156. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution are reproduced at App. 1a. The relevant provisions of 18 U.S.C. §§ 921, 922, and 924 (Supp. 1993) are reproduced at App. 1a-3a.

STATEMENT OF THE CASE

In September 1991, Petitioner Darren J. Custis was indicted in the United States District Court for the District of Maryland for possession of cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) (Count One); use of a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. § 924(c) (Count Two); and possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1) (Count Three). J.A. 3-5. Testifying at trial, Custis admitted possessing a small amount of cocaine for personal use, but denied possessing additional amounts of cocaine or the gun. J.A. 138. The jury acquitted Custis of possession of cocaine with intent to distribute (Count One) and use of a firearm during a drug trafficking offense (Count Two). The jury found him guilty, however, of possession of a firearm by a convicted felon (Count Three) and simple possession of cocaine, a misdemeanor and lesser included offense of Count One. J.A. 118.

1. Sentencing

Section 924(e) of title 18 U.S.C., commonly referred to as the Armed Career Criminal Act, raises the penalty for possession of a firearm by a felon from a maximum of 10 years in prison to a mandatory minimum of 15 years and a maximum of life in prison without parole if the defendant "has three previous convictions * * * for a violent felony or a serious drug offense * * * * " The government sought application of Section 924(e), filing a written notice that listed three prior convictions rendered by state

courts in Pennsylvania and Maryland: (1) a 1985 conviction in Pennsylvania state court for robbery; (2) a 1985 conviction in Maryland state court for burglary; and (3) a 1989 conviction in Maryland state court for attempted breaking and entering. J.A. 6-7.[1] The government did not offer state court judgments of the convictions.

Prior to the sentencing hearing, Mr. Custis asserted that Section 924(e)'s statutory minimum penalty could not apply, because both Maryland convictions were constitutionally invalid. The 1985 conviction for burglary resulted from a guilty plea. The transcript of the guilty plea, which Custis provided for the district court, affirmatively demonstrated that his lawyer did not advise him of any possible defenses, that he could have asserted a defense, and that he was "confus[ed]" during the guilty plea proceeding. J.A. 10-42.[2] Custis received a sentence of

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[1] The government's notice of enhanced penalty mistakenly described the 1989 Maryland conviction as having been for attempted burglary. J.A. 7. While this case was pending before the court of appeals, however, the Circuit Court for Baltimore County issued an order correcting the record to reflect that Custis was convicted of attempted breaking and entering. The court of appeals supplemented the record with that correction. J.A. 152 n.3.

[2] The transcript records the following colloquy:

> THE COURT: Has [your lawyer] given you certain advice as to whether or not to plead guilty, whether or not to accept the agreement? Has she given you that advice?
> THE DEFENDANT: Somewhat.
> THE COURT: Has she told you in the past the pssible [sic] defense you might have in this case?
> THE DEFENDANT: No.

eight years, with three years suspended, to run concurrently with a Pennsylvania sentence Custis was then serving. J.A. 41. Custis asserted before the district court in this case that if he had known of his possible defenses in the earlier case, he would have exercised his right to stand trial. Def. Memo., 2/26/92, Docket No. 42, pp. 1-8. Accordingly, Custis argued, his guilty plea was not knowingly and voluntarily made, and resulted from denial of effective assistance of counsel, and for both those reasons could not be counted as a prior conviction for purposes of Section 924(e). *Id.*

Custis also challenged the 1989 conviction for attempted breaking and entering which had resulted in a sentence of two years, all suspended, without any term of probation. J.A. 47-48. That conviction was entered upon a

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> THE COURT: She has not told you what defenses you might have had or that you didn't have any?
> THE DEFENDANT: No.
> THE COURT: Has she discussed the case with you?
> THE DEFENDANT: Yes, somewhat but it's been confusing.
> THE COURT: What's been confusing?
> THE DEFENDANT: The whole thing really has been confusing.

J.A. 26-27. Following this exchange, the state trial judge asked Custis whether he was satisfied with the services of his lawyer and her understanding of the law. Custis responded affirmatively. J.A. 28-29. The judge then advised "So having said that, the propbability [sic] is you would not be able to win if you appealed on the competency of your counsel." J.A. 29. Custis then asked for a moment to speak with his attorney. J.A. 29. There was no further discussion of his confusion or counsel's failure to advise him of defenses. J.A. 29-42.

plea of not guilty upon an agreed statement of facts.[3] Relying on a five page transcript of that proceeding (J.A. 43-48), Custis argued that it was essentially equivalent to a guilty plea, that the transcript did not establish a knowing and voluntary plea, and, alternatively, that even if the proceeding was not treated as a guilty plea, it was fundamentally unfair. Def. Memo., 2/26/92, Docket No. 42, pp. 8-11. At sentencing, counsel for Custis also challenged the 1989 conviction on grounds of ineffective assistance of counsel. J.A. 69-70. The government did not claim that these constitutional challenges could not be heard by the district court nor did it respond in any other way to Custis's arguments.

If either of the two convictions Custis challenged was not used for enhancement under Section 924(e), the statutory *maximum* sentence under 18 U.S.C. § 924(a)(2) would have been ten years and the Sentencing Guidelines would have prescribed a range of 33 to 41 months. If all three convictions were counted under the Armed Career Criminal Act, however, the statutory *minimum* sentence would be fifteen years, and the Sentencing Guidelines would prescribe a sentencing range of 235 to 293 months.[4] Thus,

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[3] Although this procedure "finds no express support in the [Maryland] Rules relative to Criminal Causes," *Stevenson v. State*, 37 Md. App. 635, 636, 378 A.2d 209, 210 (1977), it is often used by counsel because it is less time consuming than a plea of guilty and minimizes post-conviction attacks on counsel. *Id.* at 637 n.5, 378 A.2d at 211 n. 5. "[T]he plea is one of expediency and ofttimes is employed as a 'back handed plea of guilty.'" *Yanes v. State*, 52 Md. App. 150, 154, 448 A.2d 359, 362 (1982).

[4] The sentencing guideline for armed career criminals, guideline § 4B1.4, applies only to "[a] defendant who is subject

the counting of each of the two Maryland convictions resulted in a federal sentence approximately sixteen years longer than the sentence of about three years that otherwise would have been imposed.

In an initial letter ruling on the matter, the district court concluded that counsel's failure in 1985 to explore possible defenses with the defendant could constitute performance below the applicable standards of professional competence. Order of 2/27/92, Docket No. 46 at p. 1. The court observed that the dispositive issue was whether there was a reasonable probability that more complete information from counsel would have led Custis to decline the plea agreement and insist on going to trial. *Id.* at 2. The court deferred ruling on that issue until the sentencing hearing, noting that it should hear testimony before deciding the merits. *Id.* at 2. In addition, the court preliminarily rejected Custis's claims regarding the 1989 conviction, finding that the proceeding was not the functional equivalent of a guilty plea and was not fundamentally unfair. *Id.* at 2-3.

On March 5, 1992, the district court *sua sponte* reversed its position and issued a second letter ruling in which it refused to consider the constitutional validity of Custis's prior convictions. Order of 3/5/92, Docket No. 52. The court ruled that "collateral attacks on prior convictions will not be entertained except possibly on

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to an enhanced sentence under the provisions of 18 U.S.C. § 924(e)." United States Sentencing Commission, Guidelines Manual, § 4B1.4(a) (Nov. 1990). Thus, application of Section 924(e) was dispositive of the sentencing guideline range.

grounds of outright deprivation of the right to be represented by counsel. Because Custis was represented by counsel at both proceedings attacked in this case, I shall not consider the matter any further at sentencing." *Id.*

At the sentencing hearing conducted on March 6, 1992, the court declined to take evidence or make findings on the validity of Custis's prior convictions. J.A. 51. The court explained that "[a]s long as the lawyer is alive at the time of trial and is breathing and is physically present, there is no violation of *Gideon* * * * [and] that is the end of it in terms of this inquiry on a 924(e) collateral conviction." J.A. 70. Counting all three prior convictions as violent felonies, the court imposed a prison sentence of 235 months on Count Three (the minimum sentence prescribed by the guidelines for defendants to whom the Armed Career Criminal Act applies), and a concurrent sentence of 12 months for the misdemeanor drug offense. J.A. 120. After the sentencing hearing, the court issued a written opinion setting forth the same reasons previously given for refusing to consider Custis's arguments. J.A. 124-134.

2. Opinion of the Court of Appeals

The court of appeals affirmed in pertinent part.[5] J.A. 135-155. The court recognized that the Constitution

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[5] Apart from the sentencing issue discussed above, the district court ruled that the 1989 conviction for attempted breaking and entering counted as a "violent felony" under Section 924(e)(2)(B)(ii). J.A. 68. In addition, after imposing sentence on Custis, the court ordered a new trial on grounds that two key prosecution witnesses had been indicted for perjury. J.A. 132-134. The Fourth Circuit affirmed the sentencing ruling and reversed the grant of a new trial. J.A. 144; 152-153.

forbids imposition of an enhanced sentence based on a prior conviction that resulted from a complete denial of counsel. J.A. 145. It believed, however, that violations of *Gideon v. Wainwright*, 372 U.S. 335 (1963), are "different in kind" from the claims that Custis asserted. J.A. 145. The court thought that permitting consideration of such claims "would place a substantial burden both on the prosecutors who will be forced to defend the predicate convictions used in sentence enhancement, and on the district judges who will be forced to hear those challenges," and might unduly delay and lengthen the sentencing process. J.A. 146. In addition, the court stated that permitting federal defendants to assert constitutional challenges to prior convictions during sentencing would impair comity and federalism. J.A. 147. Although it observed that considering Custis's challenges would not directly affect the state convictions, the court opined that a state court conviction "commands respect, in whatever forum and for whatever purposes it has come under challenge." J.A. 147.

The court therefore announced that "we think that district courts are obliged to hear constitutional challenges to predicate state convictions in federal sentencing proceedings only when prejudice can be presumed from the alleged constitutional violation, regardless of the facts of the particular case; and when the right asserted is so fundamental that its violation would undercut confidence in the guilt of the defendant." J.A. 149. Applying this test to Custis's claims, the court held that a district court need not consider whether prior convictions were obtained in violation of the right to effective assistance of counsel or whether they were obtained through an unknowing and

involuntary guilty plea, because establishing either type of claim entails a "fact-intensive inquiry." J.A. 149-151. The court suggested, however, that if Custis successfully pursued his claims in state and federal courts through post-conviction and habeas proceedings, he might then seek revision of the sentence imposed in this case. J.A. 151.

SUMMARY OF ARGUMENT

This Court established more than two decades ago that prior convictions obtained in violation of the right to counsel cannot be used to enhance punishment. *Burgett v. Texas*, 389 U.S. 109 (1967); *United States v. Tucker*, 404 U.S. 443 (1972). Allowing the use of unconstitutional prior convictions to enhance punishment erodes constitutional principles, the Court has explained, and forces the accused to suffer anew from the deprivation of his constitutional rights. *Tucker*, 404 U.S. at 449. Unlike the court of appeals in this case, at least eight other circuits have uniformly considered constitutional challenges to prior convictions offered for sentencing enhancement under 18 U.S.C. § 924(e), commonly referred to as the Armed Career Criminal Act.

Congress has not attempted to limit judicial consideration of such challenges. When the Armed Career Criminal Act was enacted in 1984, it was settled law and established practice that courts would entertain constitutional challenges to prior convictions offered to enhance a criminal sentence. If Congress had intended to abrogate federal court review of prior convictions in the context of

sentencing enhancement, it would have made its intent express, especially given the constitutional overtones of the decisions. Instead, it enacted a statute which is silent on whether prior convictions can be challenged on constitutional grounds. Moreover, while Congress has enacted amendments to correct other judicial interpretations of the firearms laws that departed from the original legislative intent, it has not responded to the many court decisions permitting defendants to challenge prior convictions offered for enhancement under the Armed Career Criminal Act.

The court below recognized that some constitutional challenges must be entertained. The court announced, however, that it would permit review of only three constitutional violations: the right to counsel, adjudication by a biased judge, and direction of a guilty verdict. The two constitutional claims at issue here involve fundamental rights and merit review by the sentencing court. The right to effective assistance of counsel is indistinguishable as a matter of principle from the right to counsel recognized in *Gideon v. Wainwright*, 372 U.S. 335 (1963). A defendant who establishes ineffective assistance of counsel has necessarily shown that the proceeding resulting in his conviction was flawed and that the result of the proceeding is unreliable. Likewise, acceptance of a plea of guilt which was not knowingly and voluntarily made deprives the defendant of the most fundamental federal rights guaranteed the accused under the Bill of Rights, including the right to a jury trial, the privilege against self-incrimination, and the right to confrontation. Imposition of a more severe sentence based on convictions obtained in violation of the right to effective assistance of counsel

or based on an unknowing and involuntary guilty plea erodes constitutional principles and forces defendants to suffer anew from the earlier deprivation of their constitutional rights. By permitting review of some violations while denying review of the claims at issue here, the Fourth Circuit has created an arbitrary scheme for determining which defendants will be subject to the mandatory minimum fifteen-year sentence under Section 924(e).

The reasons relied on by the court below fail to support its decision. First, recognition of constitutional violations should not depend upon the degree of factual inquiry required to review a claim. Second, principles of comity and federalism do not weigh in favor of prohibiting review. Maryland has expressly invited other jurisdictions to examine the validity of prior convictions before using them for sentencing enhancement. Considerations of comity are largely absent because the exercise of judicial power in federal sentencing does not interfere with the state's authority. The limitation of federal court review of prior state convictions actually undermines comity concerns by burdening busy state courts with litigation on federal questions in which the state has no interest.

Third, the Fourth Circuit's concern that allowing federal courts to hear constitutional challenges to prior convictions will unduly complicate federal sentencing proceedings is unwarranted. There is no evidence that the eight circuits that routinely entertain such challenges have experienced any problem with resolving constitutional claims fairly and expeditiously. Those courts have placed the burden of proving constitutional challenges on

the defendant, and the courts have developed procedural rules that ensure efficient disposition of claims.

ARGUMENT

I. CONSTITUTIONALLY INVALID CONVICTIONS CANNOT BE A BASIS FOR SENTENCING ENHANCEMENT UNDER 18 U.S.C. SECTION 924(e)

A. Decisions of This Court and Eight Circuits Prohibit Use of Unconstitutional Prior Convictions to Enhance Punishment

It has been settled for over twenty years that the Constitution forbids use of an unconstitutional prior conviction to enhance a criminal sentence. In *Burgett v. Texas*, 389 U.S. 109 (1967), the Court held that a conviction obtained in violation of *Gideon v. Wainwright*[6] may not "be used against a person either to support guilt or enhance punishment for another offense." *Id.* at 115. As the Court explained, allowing such use of the prior conviction would not only erode the principle of *Gideon*, but also would force "the accused in effect [to] suffer[] anew from the deprivation of that Sixth Amendment right." *Id.* Following *Burgett*, the Court held in *United States v. Tucker*, 404 U.S. 443 (1972), that a federal district court could not rely, in sentencing a defendant for bank robbery, on prior state convictions that were obtained in violation of the right to counsel. 404 U.S. at 449. The

[6] 372 U.S. 335 (1963).

Court explained that although a sentencing court generally has wide discretion in determining what sentence to impose, the Constitution prohibits imposition of a sentence based in part upon "misinformation of constitutional magnitude." *Id.* In addition, as in *Burgett*, erosion of *Gideon* could be prevented only by resentencing without regard to the prior convictions. *Id.*

Unlike the court of appeals in this case, every other federal circuit to consider the issue has uniformly permitted defendants to challenge the constitutional validity of prior state convictions when offered by the government for sentencing enhancement under Section 924(e). Decisions of the First, Third, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits reflect that reliance on unconstitutional prior convictions in sentencing compromises vital federal rights. In those circuits, courts routinely examine prior convictions for constitutional defects – including the very violations Custis asserted below – before relying on them to enhance punishment under the Armed Career Criminal Act. *See, e.g., United States v. Paleo*, 967 F.2d 7, 11 (1st Cir. 1992) (permitting challenge on grounds that two convictions were obtained in violation of *Boykin v. Alabama*, 395 U.S. 238 (1969)); *United States v. Preston*, 910 F.2d 81, 87-89 (3rd Cir. 1990) (ineffective assistance of counsel), *cert. denied*, 498 U.S. 1103 (1991); *United States v. Taylor*, 882 F.2d 1018, 1031 (6th Cir. 1989) (guilty plea not knowing and voluntary), *cert. denied*, 496 U.S. 907 (1990); *United States v. Gallman*, 907 F.2d 639, 642-44 (7th Cir. 1990) (same), *cert. denied*, 449 U.S. 908 (1991); *United States v. Day*, 949 F.2d 973, 981-84 (8th Cir. 1991) (failure to hold competency hearing); *United States v. Clawson*, 831 F.2d 909, 914-15 (9th Cir.

1987) (enhancement under 18 U.S.C. App. section 1202(a), ineffective assistance of counsel), *cert. denied*, 488 U.S. 923 (1988); *United States v. Wicks*, 995 F.2d 964, 978 (10th Cir. 1993) (inadequate plea colloquy), *cert. denied*, (Nov. 15, 1993) (No. 93-6303); *United States v. Ruo*, 943 F.2d 1274, 1276-77 (11th Cir. 1991) (guilty pleas not knowing and voluntary).[7] The Fourth Circuit did not address or acknowledge these decisions in its opinion.

Nearly all of these courts reviewed the constitutionality of prior convictions without apparent objection from the government. In fact, the Department of Justice Manual itself recognizes that "a constitutionally invalid felony conviction should not be used to enhance a defendant's sentence." Dep't of Justice Manual, Vol. 9, § 63.515, p. 9-1327 (1989-2 Supp.)(citations omitted).

The Fourth Circuit stands alone among the circuits in sharply limiting the constitutional violations a court may consider.[8] In permitting review of claims that a prior

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[7] *See also United States v. Stewart*, 977 F.2d 81, 84-85 (3rd Cir. 1992) (*Boykin* challenges), *cert. denied*, 113 S. Ct. 1433 (1993); *United States v. Henry*, 933 F.2d 553, 558-61 (7th Cir. 1991) (ineffective assistance of counsel and *Boykin* challenges), *cert. denied*, 112 S. Ct. 1703 (1992); *United States v. White*, 890 F.2d 1033, 1035-36 (8th Cir. 1989) (*Boykin* violations); *United States v. Mulloy*, 3 F.3d 1337, 1339-42 (9th Cir. 1993) (plea not knowing or voluntary); *Greene v. United States*, 880 F.2d 1299, 1305-06 (11th Cir. 1989) (ineffective assistance of counsel), *cert. denied*, 494 U.S. 1018 (1990).

[8] Some circuits require or permit district courts to examine the constitutional validity of prior convictions when used for enhancement purposes under the Sentencing Guidelines. *E.g.*, *United States v. Brown*, 991 F.2d 1162, 1165-66 (3rd Cir. 1993); *United States v. Vea-Gonzales*, 999 F.2d 1326, 1330-34 (9th Cir. 1993); *United States v. Canales*, 960 F.2d 1311, 1314-15 (5th Cir. 1992); *United States v. Jakobetz*, 955 F.2d 786, 804-05 (2d Cir.), *cert. denied*, 113 S. Ct. 104 (1992). Other circuits have limited constitutional challenges to prior convictions under the sentencing guidelines. *United States v. Byrd*, 995 F.2d 536, 539-40 (4th Cir. 1993) (applying *Custis* holding to sentencing guidelines case), *petition for cert. filed*, (Oct. 18, 1993) (No. 93-6385); *United States v. Isaacs*, ___ F.3d ___, 1993 Westlaw 210537 (1st Cir. 1993), *petition for reh'g filed*, (Jul. 12, 1993) (constitutional violation must be found on face of prior conviction without further factual inquiry); *United States v. McGlocklin*, ___ F.3d ___ , 62 U.S.L.W. 2230 (6th Cir. 1993) (en banc) (discretion to permit challenges); *United States v. Roman*, 989 F.2d 1117, 1119-20 (11th Cir. 1993) (en banc) (challenges permitted when convictions are presumptively void), *petition for cert. filed*, (Jul. 29, 1993) (No. 93-5464); *United States v. Hewitt*, 942 F.2d 1270, 1276 (8th Cir. 1991) (no challenges permitted unless conviction previously ruled invalid).

conviction was obtained in violation of the right to counsel, while denying review of claims that a prior conviction was obtained in violation of the right to effective assistance of counsel or through an unknowing and involuntary plea, the Fourth Circuit has created an unconstitutional sentencing scheme under Section 924(e). Contrary to this Court's teachings in *Burgett* and *Tucker*, this scheme erodes constitutional principles and forces defendants to "suffer anew" from the deprivation of constitutional rights.

B. Congress Has Not Limited Judicial Consideration of Constitutional Challenges to Prior Convictions Offered for Sentencing Enhancement under Section 924(e)

The Armed Career Criminal Act of 1984 is codified at 18 U.S.C. § 924(e),[9] and provides in pertinent part:

> (1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court * * * for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years * * * [4]
>
> (2) As used in this subsection –
>
> * * *
>
> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult that –

[9] The Armed Career Criminal Act was originally enacted in 1984 as an amendment to Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 98-473, § 1802, 98 Stat. 2185 (1984), and was codified at 18 U.S.C. App. § 1202(a). In 1986, the enhanced penalty provision of Section 1202(a) was recodified with a minor change as 18 U.S.C. § 924(e) and made applicable to violations of 18 U.S.C. § 922(g). *See* Firearms Owners' Protection Act of 1986, Pub. L. 99-308, § 104(a), 100 Stat. 458. The conforming repeal of 18 U.S.C. App. §§ 1201-1203, which included the original Armed Career Criminal Act, took place at the same time. Pub. L. 99-308, § 104(b), 100 Stat. 459 (1986).

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and
>
> (C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

18 U.S.C. § 924(e) (Supp. 1993).

The language of the statute does not address whether previous convictions obtained in violation of the Constitution can be relied upon for sentencing enhancement. From its enactment to the present, however, courts in at least eight circuits have uniformly permitted defendants to challenge the constitutionality of prior convictions offered for enhancement under the Armed Career Criminal Act. *See supra* at pp. 13-14. No court, not even the court below, has suggested that the statute restricts a sentencing court's consideration of the validity of prior convictions.[10]

In *United States v. Paleo*, 967 F.2d 7, 11 (1st Cir. 1992), the First Circuit interpreted the statute as authorizing constitutional challenges to prior convictions used for sentencing enhancement under Section 924(e). As Judge

[10] The Fourth Circuit noted only that "Congress has not specifically directed the federal courts to examine the validity of predicate convictions in sentencing proceedings." J.A. 147, n.2.

Breyer explained for the court, nothing in the statute prevents federal courts from exercising their traditional substantive and procedural powers in sentencing nor requires courts to enhance punishment based on a prior conviction obtained in violation of the Constitution. *United States v. Paleo*, ___ F.3d ___, 1992 WL 545126 (order den. rehr'g)(1st Cir. Sept. 14, 1992), citing *Mistretta v. United States*, 488 U.S. 361, 364 (1989).

That interpretation of the statute is well grounded. When the terms of a statute are silent on an issue, the "initial focus must be on the state of the law at the time the legislation was enacted." *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 378 (1982). It is appropriate to assume that Congress knows the state of existing law and legislates with it in mind. *Albernaz v. United States*, 450 U.S. 333, 341-42 (1981). *See also Cannon v. Univ. of Chicago*, 441 U.S. 677, 698-99 (1979) (statute must be evaluated taking into account "contemporary legal context" in which it was enacted). Accordingly, "[t]he normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 501 (1986) (citation omitted). Moreover, "[i]n areas where legislation might intrude on constitutional guarantees, * * * Congress, which also has sworn to protect the Constitution, would intend to err on the side of fundamental constitutional liberties when its legislation implicates those liberties." *Regan v. Time, Inc.*, 468 U.S. 641, 697 (1984) (Stevens, J., concurring in part and dissenting in part). *Accord United States v. Clark*, 445 U.S. 23, 27 (1980).

As explained *supra* at pp. 12-13, this Court established over a decade before the 1984 enactment of the Armed Career Criminal Act that constitutionally invalid prior convictions cannot be relied upon to support guilt or enhance punishment. *Burgett v. Texas*, 389 U.S. 109, 115 (1967); *United States v. Tucker*, 404 U.S. 443, 448-49 (1972). Following *Burgett* and *Tucker*, the lower federal courts entertained a variety of constitutional challenges to prior convictions offered for sentencing enhancement. *See, e.g., United States v. Martinez*, 413 F.2d 61, 62-64 (7th Cir. 1969) (involuntary guilty plea and ineffective assistance of counsel); *Stubbs v. Mancusi*, 442 F.2d 561, 562-64 (2d Cir. 1971)(right to confrontation), *rev'd*, 408 U.S. 204 (1972)(finding no confrontation violation); *Martinez v. United States*, 464 F.2d 1289, 1290-91 (10th Cir. 1972) (privilege against self-incrimination); *Brown v. United States*, 610 F.2d 672, 674-75 (9th Cir. 1980) (ineffective assistance of counsel); *Morse v. Texas*, 691 F.2d 770, 771-73 (5th Cir. 1982) (involuntary guilty plea). Thus, when the Armed Career Criminal Act was enacted, it was both settled law and established practice that courts would entertain constitutional challenges to prior convictions offered to enhance a criminal sentence.[11] Particularly given the

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[11] Congress demonstrated its awareness of this principle as early as 1970, when it enacted the first general recidivist sentencing statute, the Dangerous Special Offender Sentencing statute, 18 U.S.C. §§ 3575-3576 (1985 & Supp. 1993). Pub. L. 91-452, Tit. X, § 1001(a), 84 Stat. 948 (1970), repealed effective 1987 by Pub. L. 98-473, Title II, c. II, § 212(a)(2), 98 Stat. 1987 (1984). Congress provided in the statute that invalid convictions were to be disregarded. 18 U.S.C. § 3575(e). The legislative history confirms that Congress believed the provision was compelled by *Burgett v. Texas*, 389 U.S. 109 (1967). *See* S. Rep. No. 617, 91st Cong., 1st Sess. 164 (1969).

constitutional overtones of these decisions, if Congress had intended to abrogate federal court review of prior convictions in the context of sentencing enhancement, it would have made that intent express.

Following enactment of the Armed Career Criminal Act, Congress has on several occasions amended the firearms statutes in response to specific court decisions. Those amendments demonstrate that Congress was aware of judicial interpretations of the statutes and corrected those that departed from the original legislative intent.[12] There has been no indication, however, that Congress wished to abrogate the widespread prevailing practice of federal court review of the constitutionality of convictions offered for enhanced sentencing. Given the number of reported decisions on this subject, *see supra* at pp. 13-14, the law and practice could not have escaped Congress's attention. Yet, while Congress corrected other court interpretations, it left standing the law that unconstitutional prior convictions may not be counted.

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[12] In 1986, the firearms laws were amended to narrow what counted as a conviction in response to court decisions. *See infra* at pp. 21-23. Pub. L. 99-308, § 101, 100 Stat. 449 (1986). In 1988, Section 924(e) was amended to clarify that the three previous convictions referred to in the statute had to be for "offenses committed on occasions different from one another." Pub. L. 100-690, § 7056, 102 Stat. 4402 (1988). Congress enacted this latter amendment in light of the government's construction of the statute in *United States v. Petty*, 798 F.2d 1157 (8th Cir. 1986), *vacated*, 481 U.S. 1034 (1987), *on remand*, 828 F.2d 2 (8th Cir. 1987). *See* 134 Cong. Rec. S17,370 (daily ed. Nov. 10, 1988) (section-by-section analysis); 134 Cong. Rec. S7449 (daily ed. June 8, 1988) (same).

In 1986, Congress amended 18 U.S.C. § 921(a)(20) to provide that convictions which have been expunged, set aside, or for which a person has been pardoned or received restoration of civil rights do not qualify as convictions for purposes of the firearms laws. Respondent suggests in its Brief responding to the Petition for Certiorari that this amendment may indicate that Congress intended for courts to rely on unconstitutional prior convictions that have not previously been set aside. No court has adopted that interpretation of the amendment, and neither the language nor the legislative history of the provision supports it.

Section 921(a)(20) was not originally enacted to govern sentencing in any respect. Rather, the provision was enacted in 1968 to exclude certain prior convictions from leading to various firearms prohibitions.[13] Section 921(a)(20) provides that the term "crime punishable by imprisonment for a term exceeding one year" does not include, *inter alia*, various white collar crimes and certain offenses classified by a State as a misdemeanor. In 1986, the Firearms Owners' Protection Act, Pub. L. 99-308, § 101, 100 Stat. 450, narrowed the statutory prohibition by adding these two sentences:

> What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored

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[13] Pub. L. 90-618, § 102, 82 Stat. 1216 (1968).

> shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.[14]

18 U.S.C. § 921(a)(20) (1976 and Supp. 1993).

Contrary to the government's interpretation, Congress did not intend this language to abrogate the settled law that unconstitutional prior convictions, whether or not previously set aside,[15] cannot be used for sentencing enhancement under Section 924(e). Rather, Congress added these two sentences to Section 921(a)(20) to *narrow* the reach of the statute and *restrict* what qualifies as a conviction. The amendment was specifically crafted to repudiate two court decisions that extended the reach of firearms prohibitions and did not even address the mandatory minimum sentence set forth in the Armed Career Criminal Act, then codified at 18 U.S.C. App. § 1202. *See Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 122 (1983)

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[14] The Firearms Owners' Protection Act of 1986 also recodified the Armed Career Criminal Act with a slight modification from 18 U.S.C. App. § 1202 to 18 U.S.C. § 924(e), and repealed sections 1201-1203, which included the original Armed Career Criminal Act. Pub. L. 99-308, § 104(b), 100 Stat. 459 (1986).

[15] The statute and its legislative history fail to reveal what Congress meant by the term "set aside" or why that term was included. The term has a variety of meanings. In some statutes, it is used to refer to a procedure similar to a pardon or expungement, procedures that are not concerned with a conviction's validity. *E.g.*, Federal Youth Corrections Act, 18 U.S.C. § 5021, (issuance of certificates "setting aside" convictions of youthful offenders), Pub. L. 865, c. 1115, § 2, 64 Stat. 1089 (1950); repealed Pub. L. 98-473, Tit. II, § 218(a)(8)(1984).

(sections 922(g)(1) and (h)(1) apply to prevent issuance of firearms license to defendant who received deferred judgment and expungement); *Thrall v. Wolfe*, 503 F.2d 313, 316 (7th Cir. 1974) (sections 922(g) and (h) bar license for defendant who received state pardon restoring civil rights), *cert. denied*, 420 U.S. 972 (1975). The Senate Report states that the amendment was designed to ensure that firearms prohibitions would not apply based on state proceedings such as those at issue in *Dickerson* and *Thrall*. S. Rep. No. 583, 98th Cong., 2d Sess. 7 (1984).[16] Thus, it is clear that Section 921(a)(20)'s restrictions on the reach of the firearms prohibitions were not intended to expand the penalty provisions of Section 924(e).[17]

In sum, the language, structure, and history of the Armed Career Criminal Act show that Congress did not intend to preclude federal courts from examining the

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[16] The Report states that as to the first sentence of the amendment, the term "conviction" would no longer include guilty pleas where no final judgment had been rendered, such as in *Dickerson*. S. Rep. No. 583, 98th Cong., 2d Sess. 7, n.16 (1984). The second sentence of the amendment to Section 921(a)(20) was intended to "exclude from such convictions any for which the person has received a pardon, civil rights restoration, or expungement of the record," and to abrogate *Thrall*. *Id.* at 7.

[17] When Congress intended to expand the penalty provisions of Section 924(e), it did so directly by adding language to that section. For example, in 1988 Congress added Section 924(e)(2)(C), which states: "As used in this subsection * * * the term 'conviction' includes a finding that a person has committed an act of juvenile delinquency involving a violent felony." Pub. L. 100-690, § 6451, 102 Stat. 4371 (1988). Prior to this amendment, the statute was silent on juvenile convictions.

constitutionality of prior convictions relied upon for sentencing enhancement. This interpretation is consistent with the established law at the time of enactment of the Armed Career Criminal Act and the constitutional requirements of which Congress was aware.

C. The Fourth Circuit's Test Undermines the Integrity of Federal Sentencing by Arbitrarily Forbidding Judicial Review of Some Constitutional Violations While Permitting Review of Others

Both the court of appeals and the government acknowledge that federal courts must consider some constitutional challenges to prior convictions offered to invoke the mandatory minimum penalty of Section 924(e).[18] The test employed by the court of appeals, however, bars review of nearly all constitutional violations. As explained in a subsequent opinion of the court of appeals, the "test" announced in this case permits review of only three constitutional violations: (1) complete denial of counsel, (2) adjudication by a biased judge, and (3) direction of a guilty verdict by the court. *United States v. Bradshaw*, 999 F.2d 798, 800 (4th Cir. 1993), *petition for cert. filed*, (October 21, 1993) (No. 93-6448).[19]

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[18] J.A. 149; Brief of the United States in Response to Petition for Certiorari at 11-12.

[19] The Fourth Circuit provided no authority for the test it employed other than a citation by analogy to *Rose v. Clark*, 478 U.S. 570, 577-578 (1986); J.A. 149. In *Rose*, this Court noted that deprivations of the right to counsel, adjudication by a biased judge, and direction of a guilty verdict by a judge cannot be harmless. *Id.* at 577-78. Of course, other constitutional errors also cannot be harmless, yet are not recognized by the Fourth Circuit. *E.g.*, *Sullivan v. Louisiana*, 113 S. Ct. 2078 (1993) (constitutionally deficient reasonable-doubt instruction); *Riggins v. Nevada*, 112 S. Ct. 1810, 1816 (1992) (forced antipsychotic medication during trial without following proper procedures); *Vasquez v. Hillery*, 474 U.S. 254, 261-64 (1986) (exclusion of members of the defendant's race from grand jury); *McKaskle v. Wiggins*, 465 U.S. 168, 177-178 n.8 (1984) (right to self-representation); *Waller v. Georgia*, 467 U.S. 39, 49 n.9 (1984) (right to public trial); *Jackson v. Virginia*, 443 U.S. 307, 320 n.14 (1979) (failure to instruct jury on reasonable doubt standard). The Fourth Circuit did not attempt to explain why it chose to permit review of the errors mentioned in *Rose* while forbidding federal courts from considering other constitutional claims.

Even these violations are to be ignored under the Fourth Circuit test unless they undercut confidence in the defendant's guilt. *Id.* at 801. Thus, under the test employed by the Fourth Circuit, prior state court convictions involving nearly all constitutional violations, no matter how egregious or offensive, are deemed conclusively valid for purposes of sentencing enhancement under Section 924(e). This conclusive presumption that even unconstitutional convictions support sentencing enhancement severely undermines the integrity of federal sentencing.

The Fourth Circuit's prohibition on court review of nearly all constitutional violations impermissibly strips a defendant of constitutional protections long recognized by this Court. In permitting defendants who suffered from one of the three violations listed above to challenge the constitutionality of a prior conviction, while denying

the same opportunity to defendants who suffered ineffective assistance of counsel or entered unknowing and involuntary pleas, the Fourth Circuit has created an arbitrary scheme for determining which defendants will be subject to the mandatory minimum fifteen-year sentence under Section 924(e). Contrary to this Court's teachings in *Burgett* and *Tucker*, this scheme erodes constitutional principles and forces defendants to "suffer anew" from the deprivation of their constitutional rights.[20]

1. Ineffective Assistance of Counsel

As this Court observed half a century ago, the assistance of counsel is "necessary to insure fundamental human rights of life and liberty." *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938). The right to counsel "assures the fairness, and thus the legitimacy, of our adversary process." *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986). Therefore, a defendant is entitled to an attorney whose advice is "within the range of competence demanded of

[20] In *Lewis v. United States*, 445 U.S. 55, 65 (1980), the Court held that a conviction not previously vacated may be used as a basis for a statutory prohibition against possession of firearms. The Court emphasized that the statute before it was regulatory in the sense that it regulated the behavior of felons by imposing essentially a civil disability. The statute did not involve sentencing enhancement, so that *Burgett* and *Tucker* were not implicated. *Id.* at 66-67. Thus, the *Lewis* opinion reflects the need for prospective knowledge of whether firearms possession is permitted. Custis's case involves a sentence enhancement scheme which is punitive, not regulatory, and no similar considerations preclude judicial review of convictions prior to their use for sentencing enhancement.

attorneys in criminal cases." *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

The court of appeals was compelled to acknowledge the importance of the right to counsel (J.A. 145), but asserted that *Gideon* violations are "different in kind" from other constitutional errors, including the denial of competent counsel. J.A. 145. The court's observation that a defendant who has been deprived of counsel has lost the ability to assert his other rights, and that the resulting conviction lacks reliability for that reason (J.A. 145), does not distinguish the right to the effective assistance of counsel. Rather, those are the very reasons the right to effective assistance exists.

In attempting to distinguish the denial of competent counsel from the total denial of counsel, the court of appeals failed to recognize that "the right to counsel is the right to the effective assistance of counsel." *McMann*, 397 U.S. at 771 n.14. The Sixth Amendment guarantees the defendant not merely the presence of a member of the bar, but actual "Assistance" which is to be "for his defence." There is no reason to assume that an incompetent lawyer offers greater assistance to a defendant than no counsel at all. On the contrary, an ineffective lawyer may affirmatively mislead a defendant or work against his interests. Ineffective assistance has been demonstrated where counsel purposefully declared his client's guilt to the jury, *United States v. Swanson*, 943 F.2d 1070, 1076 (9th Cir. 1991), abandoned the sole trial defense, *Profitt v. Waldron*, 831 F.2d 1245, 1248-49 (5th Cir. 1987), or failed to conduct any pretrial discovery or file a timely motion to suppress evidence. *Kimmelman*, 477 U.S at 387. Thus, as this Court has recognized, denial of the right to

effective assistance unquestionably undermines the fundamental fairness of the trial process. *United States v. Cronic*, 466 U.S. 648, 658 (1984).

Under the rigorous standards this Court has established for ineffective-assistance claims, a conviction is invalid only if counsel's representation fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Judicial scrutiny of counsel's performance is highly deferential, employing a strong presumption that counsel's performance fell within the "wide range of reasonable professional assistance." *Id.* at 689. Moreover, even if the record demonstrates that defense counsel was completely incompetent, the defendant must prove that counsel's errors actually had an adverse effect on the defense.[21] The defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. In the case of a guilty plea, the defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that the defendant

[21] This standard applies to cases in which the defendant alleges "actual" ineffective assistance. Prejudice is presumed with respect to other types of ineffective assistance, including an actual or constructive denial of counsel, state interference or prevention of counsel from rendering effective assistance, *Strickland v. Washington*, 466 U.S. 668, 686, 692 (1984), and counsel acting with an actual conflict of interest that adversely affected performance. *Cuyler v. Sullivan*, 446 U.S. 335, 348-50 (1980).

would not have pleaded guilty and would have insisted on a trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

Under these rigorous standards, ineffective assistance of counsel claims cannot be established unless the proceeding being challenged was fundamentally unfair. *Strickland*, 466 U.S. at 696. "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Kimmelman*, 477 U.S. at 374 (citations omitted). The focus is on whether the result of the proceeding is unreliable because of a breakdown in the adversarial process that the criminal justice system counts on to produce reliable results. *Strickland*, 466 U.S. at 696. Many significant errors will not satisfy these demanding standards. *Cf. Kimmelman*, 477 U.S. at 382. Accordingly, a defendant who establishes ineffective assistance of counsel has necessarily shown that the proceeding resulting in his conviction was flawed and that the result of that proceeding is unreliable. These are precisely the concerns underlying *Gideon v. Wainwright*, 372 U.S. 335 (1963).

At bottom, the main difference between the rights recognized in *Gideon* and *Strickland* is that a defendant who satisfies *Strickland* has proved that there is a reasonable probability that deprivation of counsel in his case probably had an adverse effect on the adversary process, whereas *Gideon* recognizes that the mere possibility of such an effect is constitutionally intolerable. Rather than providing a reason to deny review, as the court of appeals believed (J.A. 150), the fact that a defendant asserting ineffective assistance of counsel must demonstrate actual

prejudice confirms that review of this claim must be permitted.

2. Involuntary and Unknowing Guilty Plea

This Court has also recognized that the acceptance of a plea of guilt which is not knowingly and voluntarily made deprives the defendant of the most fundamental federal rights guaranteed to criminal defendants under the Bill of Rights, including the privilege against self-incrimination, right to trial by jury, and right to confront adverse witnesses. *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969). A guilty plea does not constitute a valid waiver of these rights unless it represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). A defendant cannot enter a voluntary and intelligent plea without "real notice of the true nature of the charge against him," *Henderson v. Morgan*, 426 U.S. 637, 645 (1976) (quoting *Smith v. O'Grady*, 312 U.S. 329, 334 (1941)), and an understanding of "the law in relation to the facts." *McCarthy v. United States*, 394 U.S. 459, 466 (1969). It is the defendant who must "with the help of counsel, rationally weigh the advantages of going to trial against the advantages of pleading guilty." *Brady v. United States*, 397 U.S. 742, 750 (1970).

The standard adopted by the court of appeals requires sentencing courts to ignore all claims of involuntary and unknowing guilty pleas, even if the defendant could prove that they were obtained through ignorance, incomprehension, breach of a plea agreement, blatant threats, coercion, or torture. *See, e.g., Gill v. Turner*, 443

F.2d 1064, 1064-65 (10th Cir. 1971) (guilty plea induced by police abuse and threat to file charges against brother); *Lassiter v. Turner*, 423 F.2d 897, 900 (4th Cir.) (plea induced by prosecutor's threat to revive barred charge), *cert. denied*, 400 U.S. 852 (1970); *Peete v. Rose*, 381 F. Supp. 1167, 1169-71 (W.D. Tenn. 1974) (plea based on counsel's threat that "Ku Klux" jury might sentence defendant to die in electric chair).

Imposition of a mandatory minimum sentence based on a conviction obtained in violation of the right to effective assistance of counsel or based on an unknowing and involuntary guilty plea erodes constitutional principles and forces the defendant to "suffer anew" from the earlier constitutional violation. Therefore, it necessarily follows from *Burgett* and *Tucker* that a sentencing court must consider such challenges to prior convictions offered to enhance punishment under Section 924(e). Punishing the defendant more severely on account of convictions that are themselves fruits of earlier constitutional violations cannot be squared either with the sentencing scheme Congress adopted or with rudimentary concerns of due process.

II. ECONOMY OF JUDICIAL RESOURCES AND THE COMITY CONCERNS RELIED ON BY THE FOURTH CIRCUIT FAIL TO SUPPORT LIMITATION OF REVIEW

A. Recognition of Constitutional Defects Should Not Depend upon the Degree of Factual Inquiry Required to Review a Claim

While acknowledging that prior convictions must be subject to review on grounds of denial of counsel, adjudication by a biased judge, and direction of a guilty verdict

by the court, the court below held that challenges based on ineffective assistance of counsel and unknowing and involuntary pleas may not be brought. J.A. 149-151. According to the court of appeals, violations of the right to counsel can ordinarily be determined from facial review of state court documents, whereas claims of the incompetence of counsel and the unknowing and involuntary nature of a guilty plea require a "fact-intensive" inquiry. J.A. 150-51. The suggestion that constitutional violations are to be recognized only when doing so involves no factual inquiry betrays an unacceptable view of judicial priorities. The protection of federal constitutional rights is an essential function of the federal courts. There can be no more important claims competing for the courts' time. Imposing a more severe sentence based on an earlier constitutional violation simply to avoid a factual inquiry is arbitrary and violates due process.

Moreover, the distinction drawn by the court of appeals is untenable. Deciding a claim of complete deprivation of counsel requires a determination of whether the defendant had counsel and whether he validly waived the assistance of counsel. Resolving the waiver issue requires a variety of factual inquiries. In determining the validity of waiver, a court must often consider matters such as the defendant's age, education and mental capabilities, familiarity with the criminal justice system, and awareness of the charges and penalties. *See, e.g. United States v. Belanger*, 936 F.2d 916, 918-919 (7th Cir. 1991); *Fitzpatrick v. Wainwright*, 800 F.2d 1057, 1065-66 (11th Cir. 1986).

While underestimating the factual inquiry sometimes required to review *Gideon* claims, the court of appeals

exaggerated the factual inquiry involved in the claims it placed beyond review. As experience in other circuits has shown, claims that defense counsel failed to provide effective assistance, or that a guilty plea was not knowing and voluntary, can often be resolved with minimal inquiry. *E.g., United States v. Patrone*, 948 F.2d 813, 817 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 2953 (1992); *United States v. Hope*, 906 F.2d 254, 263-64 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1640 (1991). The suggestion that such claims always involve more burdensome factual inquiries than do challenges based on *Gideon* or adjudication by a biased judge is incorrect.

B. Principles of Comity and Federalism Do Not Weigh in Favor of Sharply Limiting the Sentencing Court's Power to Review the Constitutionality of Prior Convictions

The court of appeals believed that "permitting collateral attacks on predicate state convictions in federal sentencing proceedings impairs the values both of comity and federalism." J.A. 147. Although it acknowledged that such challenges would not directly affect the state convictions, the court opined that a state court conviction "commands respect, in whatever forum and for whatever purposes it has come under challenge." J.A. 147. The court of appeals suggested that if Mr. Custis obtained relief in state or federal post-conviction proceedings, then, perhaps, he might seek resentencing in this case. J.A. 151.

The Fourth Circuit's comity concerns are misguided for several reasons. First, Maryland has expressly invited other jurisdictions to examine the validity of convictions

obtained in its courts before using them for sentencing enhancement. In *McMannis v. State*, 311 Md. 534, 536 A.2d 652 (1988), the Maryland Court of Appeals refused to consider a post-conviction petition brought by a defendant who had been sentenced as a recidivist in another jurisdiction, because his Maryland sentence had expired and he was no longer in custody. The court held that "[w]hen a challenge to the validity of a foreign predicate conviction is lodged, we believe it is the jurisdiction utilizing that foreign conviction for enhancement of sentence which should bear the responsibility of resolving that controversy." *Id.* at 544, 536 A.2d at 657. In view of this invitation, the comity concerns on which the Fourth Circuit relied are illusory.

More generally, the exercise of federal judicial power in sentencing hearings does not involve assertion of jurisdiction over a state criminal case. *United States v. Paleo*, 967 F.2d 7, 12 (1st Cir. 1992). Considerations of comity are largely absent when a federal court's examination of a prior state conviction neither overturns the conviction, frees a state prisoner, nor otherwise interferes with the state's authority. *Id.* State courts do not wish to be burdened with constitutional challenges filed by federal defendants, who usually will have completed any state sentence and will no longer be in state custody. Simply put, states seldom have an interest in the length of a federal defendant's sentence.

In this case, Custis merely informed a federal court that it should not exercise its own punitive power based on prior judgments resulting from earlier constitutional violations. The minimal impact of such a claim on state interests distinguishes this case from *Parke v. Raley*, 113 S.

Ct. 517 (1992), in which a federal habeas petitioner asked federal courts to regulate the procedures state courts may use when determining the effect of their own prior judgments.[22] No tension results between the federal and state judicial systems when a federal sentencing court examines a state conviction for the limited purpose of federal sentencing enhancement, which has an exclusively federal aim. The highest court in the state that rendered the convictions challenged in this case did not identify any costs to the state from review of state court convictions in this limited fashion. *See McMannis*, 311 Md. at 542-47, 536 A.2d at 656-58.

The opinion of the court of appeals actually *undermines* comity considerations by burdening busy state courts with litigation on federal questions in which the state has no interest. The Fourth Circuit's suggestion that the defendant pursue relief in state and federal post-conviction proceedings (J.A. 151) would only further

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[22] In *Parke*, this Court rejected a challenge to the procedures used by the courts of Kentucky for adjudicating *Boykin* claims when offered for sentencing enhancement under state law. The Court rejected the argument that due process forbids a state to require defendants to produce evidence of inadequate advisement of rights with respect to a guilty plea, or requires that *Boykin* claims ultimately be decided on a higher standard than a preponderance of the evidence. In ruling that this scheme did not violate due process, the Court observed that a presumption of validity attaches to prior convictions, at least where no transcripts or other records of the earlier plea colloquies exist. 113 S. Ct. at 523-24. Of course, that a presumption of validity applies does not mean that the presumption should be conclusive and unrebuttable. In fact, the procedures under review in *Parke* permitted the defendant to rebut the presumption of correctness. *Id.* at 520.

delay and complicate the sentencing process. First, a defendant would receive a dramatically more severe sentence in federal court, with the prior conviction automatically counting for enhancement regardless of its constitutionality. While in custody in federal prison, and usually without any lawyer to assist him, the defendant would then have to proceed to state court to pursue post-conviction remedies. If the defendant did not prevail in state court, he would next file a petition in federal court under 28 U.S.C. § 2254, again without the assistance of counsel. At the conclusion of all those proceedings, the defendant would file a petition under 28 U.S.C. § 2255 to attempt to correct the federal sentence. Burdening both state and federal courts with such duplicative and unnecessary proceedings hardly serves the interests of comity and federalism. *See Paleo*, 967 F.2d at 12-13.

The Fourth Circuit's ruling would leave many defendants with no means of preventing imposition of the mandatory minimum sentence under Section 924(e) based on an unconstitutional prior conviction. Contrary to the Fourth Circuit's assumption (*see* J.A. at 151), there is no state post-conviction review available for Custis's constitutional challenges. A post-conviction petition may be filed in Maryland only if the petitioner is incarcerated or under parole or probation supervision in connection with the conviction at issue. *See* Md. Ann. Code art. 27, § 645A(a)(1992); *McMannis v. State*, 311 Md. 534, 539-41, 536 A.2d 652, 654-55 (1988)(defendant cannot satisfy "in custody" requirement of Maryland post-conviction statute by showing that another sentence was enhanced due to Maryland prior conviction). Usually, the defendant will have completed his state term of incarceration before

being charged with a violation of 18 U.S.C. § 922(g). Accordingly, the Fourth Circuit's opinion leaves a large class of defendants, including Custis, with no means of preventing the use of unconstitutional prior convictions to invoke the mandatory minimum penalty under Section 924(e).

A defendant's failure to have previously brought a constitutional challenge does not, as the Fourth Circuit believed, demonstrate that his claims lack merit and are not worthy of review. J.A. 149. Failure to pursue post-conviction relief may instead stem from lack of access to counsel, incarceration out of state, or ignorance that viable claims exist. Some claims, such as ineffective assistance of counsel, generally cannot be raised on direct review. As this Court has observed, "[a] layman will ordinarily be unable to recognize counsel's errors and to evaluate counsel's professional performance; consequently a criminal defendant will rarely know that he has not been represented competently until after trial or appeal, usually when he consults another lawyer about his case." *Kimmelman*, 477 U.S. at 378 (citation omitted). Failure to raise a claim previously is particularly insignificant where, as here, the state judge advised the defendant that a claim challenging counsel's performance would probably not succeed. J.A. 29. Moreover, post-conviction review is never an option in some cases, such as the 1989 conviction for which Custis received a two-year suspended sentence and was therefore never in custody or even on probation or parole. J.A. 47-48.

Realistically, no defendant is likely to lodge an immediate constitutional challenge to a conviction under circumstances such as those involved here, where the

sentence for one conviction was entirely subsumed by a concurrent sentence the defendant was already serving, and the sentence for the other conviction was entirely suspended. As the Fourth Circuit explained in a case brought under the since-repealed Dangerous Special Offender statute:

> [T]here will be times when a colorable constitutional question has not been reviewed, perhaps because the defendant received a minimal sentence, and consequently the defendant or his overburdened public defender saw nothing to gain by pursuing an appeal or collateral relief. In such a situation, the arguably infirm conviction is only of consequence to the defendant when it is later used to establish special offender status.

United States v. Scarborough, 777 F.2d 175, 182 n.7 (4th Cir. 1985). After completing any sentence received, a defendant ordinarily has no opportunity to challenge the infirm conviction and it is of no further consequence unless later offered in support of an enhanced sentence. For all of these reasons, it is fallacious to assume that claims regarding prior convictions lack merit if not previously asserted.

C. Federal Courts Have Developed Procedures for Efficient Resolution of Constitutional Challenges to Prior Convictions

The Fourth Circuit expressed concern that permitting defendants to challenge the constitutional validity of prior convictions would place a substantial burden on prosecutors and district judges as well as complicate and

delay federal sentencing proceedings. J.A. 146. This concern is unfounded. As explained above, and as the First Circuit observed in *Paleo*, a rule requiring federal courts to assume that past convictions are valid "would likely increase delay, as defendants are sent from one court to another to press their various challenges." 967 F.2d at 13. Moreover, there is no evidence that the eight circuits that have routinely entertained constitutional challenges to prior convictions offered under Section 924(e) have experienced the problems that concerned the court below. Such problems are unlikely to arise, given the burden-shifting rules of proof and procedural rules that guide the consideration of constitutional claims.

The lower courts that entertain challenges to prior convictions have placed the burden of establishing unconstitutionality on the defendant. *Paleo*, 967 F.2d at 13; *United States v. Stewart*, 977 F.2d 81, 84-85 (3rd Cir. 1992), *cert. denied*, 113 S. Ct. 1433 (1993); *United States v. Taylor*, 882 F.2d 1018, 1031-32 (6th Cir. 1989), *cert. denied*, 496 U.S. 907 (1990); *United States v. Gallman*, 907 F.2d 639, 643 (7th Cir. 1990), *cert. denied*, 499 U.S. 908 (1991); *United States v. Day*, 949 F.2d 973, 982-83 (8th Cir. 1991); *United States v. Mulloy*, 3 F.3d 1337, 1339-40 (9th Cir. 1993); *United States v. Wicks*, 995 F.2d 964, 978 (10th Cir. 1993), *cert. denied*, (Nov. 15, 1993) (No 93-6303); *United States v. Ruo*, 943 F.2d 1274, 1276 (11th Cir. 1991). *See also Parke*, 113 S. Ct. at 525 (not fundamentally unfair to require a defendant to produce evidence of noncompliance with *Boykin* when no transcript exists). This widely adopted burden-of-proof rule ensures that the government need not prove the constitutionality of convictions in the first instance.

In addition, some courts have set forth specific procedural requirements for claims, requiring the defendant to state the grounds claimed for the prior conviction's unconstitutionality, as well as the anticipated proof of invalidity, and to provide an estimate of the process and time needed to obtain any required evidence. *E.g., United States v. Aloi*, ___ F.3d ___, 1993 Westlaw 435270 (6th Cir. 1993). Several courts have examined factors such as the defendant's prior exposure to the criminal justice system, and the state court's custom, practice, and rules in determining whether claims are meritorious. *Stewart*, 977 F.2d at 85 (prior exposure to justice system); *United States v. Dickerson*, 901 F.2d 579, 583 (7th Cir. 1990) (state court's custom and practice). Conclusory assertions of constitutional violations can be rejected with minimal inquiry. *United States v. Hope*, 906 F.2d 254, 263 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1640 (1991). These procedures facilitate efficient review of constitutional claims.

District courts have the experience and capability to resolve claims of this nature expeditiously. Rule 32 of the Federal Rules of Criminal Procedure sets forth sentencing procedures and generally requires that courts resolve disputed sentencing issues. Fed. R. Crim. P. 32(a)(1); (c)(3). The kind of information a sentencing court may consider and the sources from which it may come is largely unlimited. 18 U.S.C. § 3661; *Roberts v. United States*, 445 U.S. 552, 556 (1980). The district court has wide discretion in deciding whether an evidentiary hearing is needed. In many cases involving constitutional challenges, the defendant's claim can be fully adjudicated on the basis of the existing record. Assessment of a claim can often be

based on court documents, written arguments, proffers, or affidavits.[23]

Because of the rigorous standards for evaluating ineffective assistance of counsel claims, only in rare cases will the defendant advance a viable claim. Furthermore, Rule 11 of the Federal Rules of Criminal Procedure and the analogous state rules, which have been in effect for nearly a quarter-century, generally provide a complete record of the factors relevant to the determination of whether the plea is knowing and voluntary. Therefore, the number of defendants likely to raise constitutional challenges to prior convictions used for sentencing enhancement under the Armed Career Criminal Act is small and probably diminishing over time.

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[23] In this case, for instance, the district court initially narrowed the claims regarding the 1985 conviction to a single issue, and rejected the claims regarding the 1989 conviction based solely on the papers submitted, and without submission of any response from the government. As explained *supra* at pp. 6-7, the court later refused to consider the claims or make any findings at sentencing. J.A. 51.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Fourth Circuit should be reversed and the case should be remanded for resentencing.

Respectfully submitted,

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APPENDIX

APPENDIX

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides: "No person shall be * * * deprived of life, liberty, or property, without due process of law * * * * * "

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * * and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution, Section 1, provides that no "State [shall] deprive any person of life, liberty, or property, without due process of law * * * * * "

STATUTES

18 U.S.C. §§ 921, 922, and 924 (Supp. 1993)

1. 18 U.S.C. § 921(a)(20) states:

The term "crime punishable by imprisonment for a term exceeding one year" does not include –

> (A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or

(B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

2. 18 U.S.C. § 922(g) provides:

It shall be unlawful for any person –

(1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year * * * to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

3. 18 U.S.C. § 924(e) provides, in pertinent part:

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence

of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g), and such person shall not be eligible for parole with respect to the sentence imposed under this subsection.

(2) As used in this subsection –

* * *

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year * * * that –

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

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No. 93-5209

In the Supreme Court of the United States

OCTOBER TERM, 1993

DARREN J. CUSTIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a defendant in a federal sentencing proceeding may collaterally attack the validity of previous state convictions that are used to enhance his sentence under the Armed Career Criminal Act, 18 U.S.C. 924(e).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	3
Summary of argument	9
Argument:	
I. The Armed Career Criminal Act does not permit a defendant, at sentencing, to challenge the validity of prior state court convictions used to enhance his sentence	12
II. The Constitution does not require that petitioner be allowed to attack the validity of the prior convictions that were used to enhance his sentence	16
A. A prior conviction may constitutionally be used for sentence enhancement unless its use would be arbitrary	17
B. An unrestricted right to collateral relief from prior convictions used for sentencing would undermine principles of finality	21
C. Repeat-offender schemes have traditionally allowed collateral attacks on prior convictions only on limited grounds	26
D. Petitioner's claims do not require the sentencing court to entertain a collateral attack on his prior convictions	29
1. The 1985 Maryland state court conviction	29
2. The 1989 Maryland state court conviction	31
Conclusion	35

TABLE OF AUTHORITIES

Cases: Page

Adams v. *Peterson*, 968 F.2d 835 (9th Cir. 1992), cert. denied, 113 S. Ct. 1818 (1993) 32
Arizona v. *Fulminante*, 499 U.S. 279 (1991) 20, 21
Berry v. *Mintzes*, 726 F.2d 1142 (6th Cir.), cert. denied, 467 U.S. 1245 (1984) 34
Boykin v. *Alabama*, 395 U.S. 238 (1969) 32, 33, 35
Brady v. *United States*, 397 U.S. 742 (1970) 33
Burgett v. *Texas*, 389 U.S. 109 (1967) 7, 20, 31
Castille v. *Peoples*, 489 U.S. 346 (1989) 22
Chapman v. *United States*, 111 S. Ct. 1919 (1991) .. 18, 19
Coleman v. *Thompson*, 111 S. Ct. 2546 (1991) 22
Dominguez v. *Henderson*, 447 F.2d 207 (5th Cir. 1971) 34
England v. *State*, 530 N.E.2d 100 (Ind. 1988) 28
Engle v. *Isaac*, 456 U.S. 107 (1982) 22, 25
Fairbanks v. *State*, 629 A.2d 63 (Md. 1993) 28
Gideon v. *Wainwright*, 372 U.S. 335 (1963) 7, 34
Graham v. *West Virginia*, 224 U.S. 616 (1912) 17
Gryger v. *Burke*, 334 U.S. 728 (1948) 17
Halliday v. *United States*, 394 U.S. 831 (1969) 34
Henry v. *Mississippi*, 379 U.S. 443 (1965) 22
Hill v. *Lockhart*, 474 U.S. 52 (1985) 25, 30
Johnston v. *State*, 829 P.2d 1179 (Wyo. 1992) 28
Kelley v. *People*, 4 N.E. 644 (Ill. 1886) 27
Lacy v. *People*, 775 P.2d 1 (Colo.), cert. denied, 493 U.S. 944 (1989) 28
Lakomy v. *People*, 178 P. 571 (Colo. 1919) 27
Latney v. *United States*, 18 App. D.C. 265 (1901) ... 27
Lewis v. *United States*, 445 U.S. 55 (1980) 14, 15, 20
Linkletter v. *Walker*, 381 U.S. 618 (1965) 20, 34
Loper v. *Beto*, 405 U.S. 473 (1972) 23, 24
Mackey v. *United States*, 401 U.S. 667 (1971) 20
Mathis v. *Hocker*, 459 F.2d 988 (9th Cir. 1972) 34
McCarthy v. *United States*, 394 U.S. 459 (1969) 33
McMillan v. *Pennsylvania*, 477 U.S. 79 (1986) 19
Medina v. *California*, 112 S. Ct. 2572 (1992) 26, 27

Cases—Continued: Page

Meller v. *Missouri*, 431 F.2d 120 (8th Cir. 1970), cert. denied, 400 U.S. 996 (1971) 34
Moore v. *Missouri*, 159 U.S. 673 (1895) 17-18
Oliphant v. *State*, 806 S.W.2d 215 (Tenn. Crim. App.), appeal denied (Tenn. Mar. 11, 1991) 28
Oyler v. *Boles*, 368 U.S. 448 (1962) 18
Parke v. *Raley*, 113 S. Ct. 517 (1992) 10, 11, 17, 18, 22, 23, 27, 29, 31, 32
People v. *McCullough*, 89 N.E.2d 335 (N.Y. 1949), cert. denied, 339 U.S. 924 (1950) 27
Plumbly v. *Commonwealth*, 43 Mass. (2 Met.) 413 (1841) 27
Spencer v. *Texas*, 385 U.S. 554 (1967) 17, 18, 29
State v. *Nowicki*, 474 N.W.2d 478 (Neb. 1991) 28
State v. *Webb*, 162 N.W. 358 (N.D. 1917) 27
State ex rel. Collins v. *Superior Court*, 754 P.2d 1346 (Ariz. 1988) 28
Strickland v. *Washington*, 466 U.S. 668 (1984) 6, 21-22, 30
Townsend v. *Burke*, 334 U.S. 736 (1948) 19
Tumey v. *Ohio*, 273 U.S. 510 (1927) 21
United States v. *Addonizio*, 442 U.S. 178 (1979) 25
United States v. *Dunnigan*, 113 S. Ct. 1111 (1993) 19
United States v. *Elliott*, 992 F.2d 853 (8th Cir. 1993), petition for cert. pending, No. 93-5570 28-29
United States v. *Frady*, 456 U.S. 152 (1982) 21
United States v. *Grayson*, 438 U.S. 41 (1978) 18
United States v. *Isaacs*, No. 92-2129 (1st Cir. June 22, 1993) 28
United States v. *Pereira*, 574 F.2d 103 (2d Cir.), cert. denied, 439 U.S. 847 (1978) 34
United States v. *Roman*, 989 F.2d 1117 (11th Cir. 1993), petition for cert. pending, No. 93-5464 28
United States v. *Timmreck*, 441 U.S. 780 (1979) 24, 25, 34, 35
United States v. *Tucker*, 404 U.S. 443 (1972) 7, 18, 20
United States v. *Vea-Gonzales*, 999 F.2d 1326 (9th Cir. 1993) 28
Vincent v. *State*, 27 So.2d 556 (Miss. 1946) 27

Cases—Continued: Page

Watkins, Ex parte, 28 U.S. (3 Pet.) 193 (1830) 27
Wesley v. *Commonwealth*, 56 S.E.2d 362 (Va. 1949) 27
Williams v. *New York*, 337 U.S. 241 (1949) 18, 19
Wisconsin v. *Mitchell*, 113 S. Ct. 2194 (1993) 18

Constitution, statutes, rule and Sentencing Guidelines:

U.S. Const. Amend. V (Due Process Clause) 10, 16, 18, 23, 26, 29
Armed Career Criminal Act of 1984, Pub. L. No. 98-473, Tit. II, ch. XVIII, § 1802, 98 Stat. 2185 (presently codified at 18 U.S.C. 924(e)) 4, 9, 12
18 U.S.C. 924(e) 3, 4, 5, 6, 9, 12, 13, 23
18 U.S.C. 924(e)(1) 3, 4, 9, 12, 15
Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, 98 Stat. 1976:
§ 212(a)(2), 98 Stat. 1987 14
§ 219(a), 98 Stat. 2027 14
Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236:
§ 409, 84 Stat. 1266-1269 14
21 U.S.C. 849 (1982) (repealed) 14
21 U.S.C. 849(c) (1982) (repealed) 14
§ 411(c), 84 Stat. 1270 13
21 U.S.C. 851(c) 13
Gun Control Act of 1968, 18 U.S.C. 921(a)(20) 2, 9, 13
Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922:
§ 1001, 84 Stat. 948-950 (formerly codified at 18 U.S.C. 3575 (1982)) 14
§ 1001, 84 Stat. 949 (formerly codified at 18 U.S.C. 3575(e) (1982)) 14
18 U.S.C. App. 1202(a) (1982) (repealed) 15
18 U.S.C. App. 1202(a)(1) (1982) (repealed) 14

Statutes, rule and Sentencing Guidelines—Continued: Page

18 U.S.C. 922 12
18 U.S.C. 922(g) 2, 4, 12, 23
18 U.S.C. 922(g)(1) 2, 4, 12, 14, 15
18 U.S.C. 924 12
18 U.S.C. 924(a)(2) 3, 12
18 U.S.C. 924(c) 3
18 U.S.C. 3661 18
21 U.S.C. 841(a)(1) 3
21 U.S.C. 844 3
28 U.S.C. 2255 34
Fed. R. Crim. P. 11 ..... 33, 34
Sentencing Guidelines (Nov. 1, 1993):
§ 4A1.2 16
§ 4A1.2, Application Note 6 16

Miscellaneous:

12 *Cyclopedia of Law & Procedure: Criminal Law* (1904) 27
T. Cooley, *Constitutional Limitations* (1868) 27

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-5209

DARREN J. CUSTIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (J.A. 135-154) is reported at 988 F.2d 1355. The opinion of the district court (J.A. 124-134) is reported at 786 F. Supp. 533.

JURISDICTION

The judgment of the court of appeals was entered on March 22, 1993. A petition for rehearing was denied on April 30, 1993. J.A. 154-155. The petition for a writ of certiorari was filed on July 15, 1993, and was granted on October 12, 1993, limited to the first question presented in the petition. J.A. 156. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. 921 provides in pertinent part as follows:

(a) As used in this chapter—

* * * * *

(20) The term "crime punishable by imprisonment for a term exceeding one year" does not include—

(A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or

(B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

18 U.S.C. 922 provides in pertinent part as follows:

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year;

* * * * *

to ship or transport in interstate or foreign commerce,

or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. 924(a)(2) provides in pertinent part as follows:

Whoever knowingly violates subsection[ ] * * * (g) * * * of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

18 U.S.C. 924(e)(1) provides in pertinent part as follows:

In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g), and such person shall not be eligible for parole with respect to the sentence imposed under this subsection.

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted of possessing cocaine, in violation of 21 U.S.C. 844,[1] and of

[1] Petitioner was charged with possession of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). J.A. 3. The jury found him guilty of the lesser included offense of simple possession. J.A. 117-118. The jury acquitted petitioner of using a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c). J.A. 118.

being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 235 months in prison, to be followed by three years of supervised release. J.A. 117-121.

1. At approximately 5 p.m. on July 1, 1991, two police officers approached an intersection known to be the site of extensive drug activity in Baltimore, Maryland. Several persons were standing on the corner in front of a convenience store. One of them called out a warning that officers were nearby. Petitioner fled into the store. 11/18/91 Tr. 83-85, 111-112.

As one of the officers followed petitioner into the store, he heard a loud "thump" in the area near the right wall, where petitioner was standing between two video machines. 11/18/91 Tr. 85-87, 120-121, 145-146. Petitioner tried to leave, but the officers stopped him. One of the officers searched the area near the right wall and found a loaded .38 caliber revolver on the floor between the two video machines. 11/18/91 Tr. 87-88, 92-94, 103-104. When petitioner was arrested, he dropped a small bag of cocaine. The officers found 18 similar bags of cocaine on the floor against the wall near one of the video machines. 11/18/91 Tr. 89-92, 94-96, 125-126; 11/19/91 Tr. 207-211. The next day, petitioner told a detective that the firearm belonged to him, and that he was an enforcer for a drug distribution ring. 11/19/91 Tr. 169-175.[2]

2. Prior to trial, the government filed a notice that it would seek an enhanced penalty under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e). J.A. 6-7. Section 924(e)(1) prescribes a 15-year mandatory minimum prison term for any person who violates 18 U.S.C. 922(g)

[2] The parties stipulated at trial that prior to July 1, 1991, petitioner had been convicted in a court of a State or the United States of a crime punishable by imprisonment for a term exceeding one year. 11/19/91 Tr. 244-245.

and "has three previous convictions by any court referred to in [18 U.S.C.] 922(g)(1) * * * for a violent felony or a serious drug offense, or both, committed on occasions different from one another." The notice charged that petitioner had three prior state felony convictions: (1) a 1985 Pennsylvania state court conviction for robbery; (2) a 1985 Maryland state court conviction for burglary; and (3) a 1989 Maryland state court conviction for attempted burglary. J.A. 6-7.

Petitioner challenged the use of his two Maryland convictions for sentence enhancement under Section 924(e). First, he argued that his 1985 burglary conviction had been obtained unconstitutionally because he had received ineffective assistance of counsel and had not entered a voluntary and intelligent guilty plea. Petitioner claimed that his attorney in that case had failed to advise him of the defense of voluntary intoxication. Petitioner contended that he would have gone to trial, rather than plead guilty, had he been aware of that defense. J.A. 57-58; 2/26/92 Pet. Dist. Ct. Mem. 1-8.

Petitioner challenged his 1989 conviction on the ground that it had been based upon a "stipulated facts" trial; that such a trial was in effect the same as a guilty plea; that he had not been adequately advised of the rights he was waiving by agreeing to a stipulated facts trial; and that his conviction was therefore fundamentally unfair. J.A. 59; 2/26/92 Pet. Dist. Ct. Mem. 8-11. Petitioner further argued that he had been denied effective assistance of counsel in that case because the stipulated facts established only attempted breaking and entering rather than attempted burglary under state law. J.A. 69-70.[3]

[3] Petitioner also challenged his 1989 conviction on the ground that it was not a "violent felony" conviction for purposes of Section 924(e). He argued that he should have been convicted of attempted breaking and entering and not attempted burglary. J.A. 60-68. The district court ruled that petitioner's 1989 Maryland conviction was a "violent felony" for

The district court refused to entertain petitioner's collateral attacks on his two Maryland convictions. In a letter ruling, the court initially determined that the performance of petitioner's attorney in the 1985 case did not fall below the level of professional competence required under *Strickland* v. *Washington*, 466 U.S. 668 (1984). 2/27/92 Order 1. The court found that it was not unreasonable for counsel to recommend a guilty plea in that case under the circumstances. *Id.* at 2.[4] In addition, the court rejected petitioner's claim that his 1989 "stipulated facts" trial was the functional equivalent of a guilty plea. *Id.* at 2-3.

Subsequently, the district court determined that it could not entertain petitioner's challenges to his prior convictions at all. The court noted that "[u]nlike the statutory scheme for enhancement of sentences in drug cases [21 U.S.C. 851], the [ACCA] provides no statutory right to challenge prior convictions relied upon by the Government for enhancement." J.A. 128. The court further concluded that the Constitution

purposes of Section 924(e) even if the conviction should have been for attempted breaking and entering. J.A. 68-69. While petitioner's appeal was pending, the state court entered an order deleting the references to "attempted burglary" and substituting "attempted breaking and entering." J.A. 152 n.3. The court of appeals held that "attempted breaking and entering 'presents a serious potential risk of physical injury to another' and thus constitutes a violent felony" for purposes of Section 924(e). J.A. 153. Petitioner sought review of that ruling in this Court, but the Court did not grant certiorari on that question.

[4] The court cited several considerations: "the intoxication defense is only partial; the burglary plea was part of a package that included a plea to an unrelated theft charge * * *; there was evidence negating the high degree of intoxication necessary to make out the defense of voluntary intoxication, *viz*, that [petitioner] stole only items of high value (antique statues) and secreted them in his mother's car; and the natural skepticism of a fact-finder towards a defense of voluntary intoxication, *soi-disant*." 2/27/92 Order 2.

bars the use of a prior conviction for sentence enhancement only when there was a complete denial of counsel in the prior proceeding. *Ibid.*, citing *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *United States* v. *Tucker*, 404 U.S. 443 (1972); and *Burgett* v. *Texas*, 389 U.S. 109 (1967). Because petitioner was represented by counsel in the two Maryland cases, the district court found no occasion to review the validity of his prior convictions in the sentencing proceedings. J.A. 131.

Based on petitioner's offense level of 33 and his criminal history category of VI, the district court determined that petitioner's sentencing range under the Sentencing Guidelines was 235-293 months in prison. The court then sentenced petitioner to 235 months in prison. J.A. 88, 93-94.[5]

3. The court of appeals affirmed. J.A. 135-154. The court noted that in *Burgett* and *Tucker*, this Court held that defendants may collaterally attack prior convictions used for sentencing purposes when the ground for challenging the prior convictions is that the defendant was denied counsel. Such claims, the court of appeals explained, are "different in kind from other constitutional errors" because the complete denial of counsel leaves the judicial system with "no assurance that the prior conviction reliably establishe[d] the defendant's guilt." J.A. 145. In addition, the court concluded that because such claims "will ordinarily lend themselves to facial review from * * * state court documents offered by the government to establish the conviction," the burden of adjudicating claims of complete deprivation of counsel "should * * * not be a heavy one." J.A. 146.

[5] After sentencing, the district court granted petitioner's motion for a new trial because the two police officers who were witnesses in this case had been indicted in state court for perjury in an unrelated case. J.A. 132-134. The court of appeals reversed, finding that the circumstances did not warrant departure from the general rule that subsequent discovery of impeachment evidence does not warrant a new trial. J.A. 140-144.

The court concluded that to accord a defendant a broad right to challenge prior convictions at sentencing would create significant practical impediments to the implementation of the sentence-enhancement scheme. The court explained, J.A. 146-147 (citations omitted):

> Even when the defendant's constitutional attack has no merit, establishing the validity of convictions that may be both geographically and tempora[lly] distant presents considerable practical difficulties. Many of the challenge[d] predicate convictions will be from state courts, and the procedures of those courts are likely to be unfamiliar to court and counsel. This unfamiliarity will be compounded by the fact that the attorneys of the state that convicted the defendant will not be there to defend that state's procedures. Moreover, the "inadequacy or unavailability of state court records and witnesses" from multiple or far-flung jurisdictions may further complicate the process.

The court added that "permitting collateral attacks on predicate state convictions in federal sentencing proceedings impairs the values both of comity and federalism." J.A. 147.

The court of appeals held that "district courts are obliged to hear constitutional challenges to predicate state convictions in federal sentencing proceedings only when prejudice can be presumed from the alleged constitutional violation, regardless of the facts of the particular case; and when the right asserted is so fundamental that its violation would undercut confidence in the guilt of the defendant." J.A. 149. Because petitioner's claims did not satisfy that standard, the court of appeals held that the sentencing court had properly declined to consider petitioner's challenges to his Maryland convictions. J.A. 149-151.

SUMMARY OF ARGUMENT

I. The Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(1), provides an enhanced sentence for any person who unlawfully possesses a firearm in violation of 18 U.S.C. 922(g) and "has three previous convictions by any court referred to in [18 U.S.C.] 922(g)(1) * * * for a violent felony or a serious drug offense, or both, committed on occasions different from one another." By focusing on any person who "has three prior convictions," Section 924(e) looks to the fact of the previous convictions; it nowhere suggests that those convictions must be subject to scrutiny for potential constitutional errors before they may be counted. In fact, the definitional provision applicable to Section 924(e) provides that a court may not a count a conviction "which *has been* * * * set aside" (18 U.S.C. 921(a)(20) (emphasis added)), thereby suggesting that a court may rely on a prior conviction that *has not* been set aside. That conclusion is supported, moreover, by the fact that in other federal statutes, Congress explicitly stated when it intended to allow collateral attacks on prior convictions used for sentencing.

II. A. Statutes that enhance criminal penalties on the basis of prior convictions have a long tradition dating back to colonial times. As this Court has made clear, repeat-offender statutes do not impose additional punishment for the prior offenses, but merely provide a reasonable means of classifying persons as more serious offenders when they commit subsequent offenses after having been convicted previously. This Court has upheld such statutes against numerous constitutional challenges, and the validity of repeat-offender schemes is no longer open to serious question.

In designing those statutes, the States and the federal government have substantial freedom in prescribing punishments. This Court has made clear that a sentencing court may consider a broad range of factors relating to a defendant's crimi-

nal history, as long as the sentence is not based on an arbitrary distinction that violates the Due Process Clause. Thus, while Congress could insist that prior convictions be excluded from consideration for enhancement unless they are found to be wholly free from error, it should also be free to permit the use of prior convictions without regard to possible errors in the proceedings leading to those convictions, unless the errors are so grave that the resulting convictions necessarily lack reliability. Only with respect to a conviction of that sort is it arbitrary to impose a more severe sentence on a defendant based on a prior conviction.

B. A regime allowing defendants freely to challenge the validity of prior convictions used for sentencing would erode principles of finality important to our criminal justice system. As this Court explained last Term in *Parke* v. *Raley*, 113 S. Ct. 517 (1992), challenges to prior convictions used for sentence enhancement are collateral attacks on final judgments. The interests in the finality of prior judgments in that context are similar to but even stronger than in the case of collateral attacks on convictions through habeas corpus. In addition, a constitutional rule requiring courts to recognize a broad range of challenges to prior convictions would undermine the effectiveness of sentence-enhancement statutes. Prior convictions frequently involve closed cases and often come from other jurisdictions. While basic information about the convictions ordinarily can be found, record material such as transcripts and pleadings are often unavailable because, for example, the materials have been lost, or an appeal was never taken and the pertinent court sessions were therefore never transcribed.

The prohibition against challenges to prior convictions that are used for enhancement should be particularly strict in the case of convictions resulting from guilty pleas. This Court has emphasized that inroads on finality with respect to guilty

pleas are particularly problematic because the vast majority of convictions are entered pursuant to guilty pleas, and because a guilty plea is an especially reliable indicator of guilt. In addition, if a defendant is able to mount a collateral attack on a guilty plea after the sentence has been served, he may be able to retain the direct advantages of a plea bargain while avoiding the collateral consequences of the judgment to which he agreed.

C. Historical practice confirms that a defendant should be given only a narrow right to challenge the validity of previous convictions used for sentencing. As this Court recognized in *Parke* v. *Raley*, *supra*, for much of our history state courts did not allow recidivists to challenge prior convictions on the ground that they were erroneous, but limited such collateral attacks to the claim that prior convictions were void for lack of jurisdiction. Contemporary practice, moreover, discloses that there is no uniform state or federal approach to the question whether and to what extent a repeat offender should be entitled to challenge his prior convictions at sentencing. Thus, petitioner's claimed due process right has no foundation in history or practice.

D. A defendant should not be allowed to exclude his prior convictions for enhancement purposes by claiming that he received ineffective assistance of counsel in connection with a prior conviction or that he was not advised of the rights he was waiving by agreeing to a stipulated facts trial. Particularly where a prior guilty plea is concerned, Congress may rationally determine that a prior conviction may be used for sentencing without allowing the defendant to raise an ineffective-assistance-of-counsel claim that he could have but did not raise on direct appeal or in a collateral attack on the primary sentence. And the omission of an advisement of rights is not a constitutional error, much less a fundamental flaw that so undermines the reliability of a prior conviction that it

violates due process for a court to rely on that conviction for enhancement purposes in a later case.

ARGUMENT

I. THE ARMED CAREER CRIMINAL ACT DOES NOT PERMIT A DEFENDANT, AT SENTENCING, TO CHALLENGE THE VALIDITY OF PRIOR STATE COURT CONVICTIONS USED TO ENHANCE HIS SENTENCE

The Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), establishes a sentence-enhancement scheme for those who violate 18 U.S.C. 922(g). Under Section 922(g), it is unlawful for any person to possess a firearm in interstate commerce if he falls into one of several enumerated categories, including persons "who ha[ve] been convicted in any court of a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. 922(g)(1). The penalties for violating Section 922 are found in Section 924. Section 924(a)(2) provides that anyone who "knowingly violates" Section 922(g) "shall be fined as provided in this title, imprisoned not more than 10 years or both." Section 924(e)(1) prescribes enhanced sentences (including a 15-year mandatory minimum prison term) for any person who violates Section 922(g) and "has three previous convictions by any court referred to in [18 U.S.C.] 922(g)(1) * * * for a violent felony or a serious drug offense, or both, committed on occasions different from one another."

Petitioner contends (Br. 16-24) that the ACCA should be construed to permit defendants to challenge the constitutionality of convictions used for sentencing under Section 924(e). The ACCA, however, does not authorize such collateral attacks. Section 924(e) applies whenever a defendant "has three previous convictions" of the specified character. Thus, the statute focuses on the fact of the previous convictions. Nothing in the statutory language suggests that, in addition,

prior final convictions must be subject to scrutiny for potential constitutional errors before they may be counted under Section 924(e).

Nor is there any basis for finding an implied right to challenge the constitutionality of prior convictions under the ACCA. The definitional provision of the Gun Control Act of 1968 (of which the ACCA is a part) makes clear that unchallenged prior convictions may be used for purposes of Section 924(e). In enumerating the circumstances in which a prior conviction may be counted for purposes of sentencing under the Gun Control Act, 18 U.S.C. 921(a)(20) states:

> What constitutes a conviction of * * * a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter [18 U.S.C. 921-930].

Thus, Congress specified that when a state conviction is used for enhancement, the existence of an appropriate "conviction" must be determined under the law of the rendering State. More importantly, the implication of the provision that a court may not count a conviction "which *has been* * * * set aside" is that courts may rely on a prior conviction that *has not* been set aside.

That conclusion is supported by Congress's enactment of other statutes that, by contrast to the ACCA, explicitly permit repeat offenders to challenge prior convictions that are used for enhancement purposes. For example, 21 U.S.C. 851(c), which was enacted as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 411(c), 84 Stat. 1270, sets forth specific procedures allowing a defendant to challenge the validity of a

prior conviction used to enhance the sentence for a federal drug offense. In addition, the enhancement provisions of the now-repealed dangerous special drug offender law, 21 U.S.C. 849 (1982), which was enacted as part of the same legislation (Pub. L. No. 91-513, § 409, 84 Stat. 1266), provided that "[a] conviction shown on direct or collateral review *or at the [sentencing] hearing* to be invalid * * * shall be disregarded." 21 U.S.C. 849(e) (1982) (emphasis added). See also Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1001, 84 Stat. 949 (formerly codified at 18 U.S.C. 3575(e) (1982)). The fact that Congress did not include a similar qualification in the ACCA strongly suggests that it did not intend to give defendants the right to challenge the validity of prior convictions used for sentence enhancement under that statute.[6]

This Court's decision in *Lewis* v. *United States*, 445 U.S. 55 (1980), provides strong support for that analysis. *Lewis* involved 18 U.S.C. App. 1202(a)(1) (1982), one of the predecessors to the current version of 18 U.S.C. 922(g)(1). The Court held that a defendant could not challenge the validity of a predicate conviction under that statute. As the Court explained, the "plain meaning [of the term 'convicted'] is that the fact of a felony conviction imposes a firearms disability until the conviction is vacated or the felon is relieved of his disability by some affirmative action." 445 U.S. at 60-61. The Court then added (*id.* at 62):

[6] Congress repealed 18 U.S.C. 3575 and 21 U.S.C. 849 in the same omnibus statute in which it enacted the ACCA. See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, §§ 212(a)(2), 219(a), 98 Stat. 1987, 2027. If Congress had wished to establish a right of collateral review at sentencing under the ACCA, it could have included the same authorizing language in the ACCA that it had used in the statutes it was repealing.

> No exception, however, is made for a person whose outstanding felony conviction ultimately might turn out to be invalid for any reason. On its face, therefore, § 1202(a)(1) contains nothing by way of restrictive language. It thus stands in contrast with other federal statutes that explicitly permit a defendant to challenge, by way of defense, the validity or constitutionality of the predicate felony. See, *e.g.*, 18 U.S.C. § 3575(e) (dangerous special offender) and 21 U.S.C. § 851(c)(2) (recidivism under the Comprehensive Drug Abuse Prevention and Control Act of 1970).

The Court accordingly held that "the firearms prosecution does not open the predicate conviction to a new form of collateral attack." *Id.* at 67.

Congress's unqualified use of the term "previous convictions" in the ACCA, a successor to the statute that was construed in *Lewis*, should be construed in the same fashion: not to open the prior convictions to a new, and unspecified, form of collateral attack.[7] To construe the ACCA differently would lead to the anomalous result that the term "convicted" in Section 922(g)(1) would have a completely different meaning from the word "convictions" in Section 924(e)(1), with

[7] Petitioner argues (Br. 18-20) that when Congress enacted the ACCA in 1984, it did so against a legal background that assumed the general availability of collateral attacks on the constitutionality of prior convictions. Congress enacted the ACCA in 1984 as an amendment to former 18 U.S.C. App. 1202(a). *Lewis* had by then established the principle that Congress speaks explicitly when it intends to authorize collateral attacks on predicate convictions used in a federal statutory scheme, and *Lewis* had decided that question in construing the very statute to which Congress attached the ACCA. Thus, to the extent that Congress enacted the ACCA against a background interpretive principle, that principle was that the term "convictions" should not be interpreted to mean "convictions that would not have been subject to legal challenge on direct appeal."

no textual suggestion that the term should be construed differently in the two companion provisions.[8]

II. THE CONSTITUTION DOES NOT REQUIRE THAT PETITIONER BE ALLOWED TO ATTACK THE VALIDITY OF THE PRIOR CONVICTIONS THAT WERE USED TO ENHANCE HIS SENTENCE

Petitioner argues that even if the ACCA does not authorize him to challenge the validity of the prior convictions used to enhance his sentence, the Constitution requires that he be permitted to do so. We submit that nothing in the Constitution requires a State or the federal government to afford a defendant a broad right to challenge the validity of prior convictions before they can be used for sentence enhancement. Only if the prior convictions were obtained without the basic elements necessary to a reliable judgment does the Due Process Clause bar the government from using the simple fact of conviction as a basis for sentence enhancement. Thus, as the court of appeals held, collateral review of a prior conviction in a sentencing proceeding is permitted

[8] Petitioner notes (Br. 14 n.8) that several courts of appeals allow consideration of the constitutionality of previous convictions when they are used to determine a defendant's sentence under the Sentencing Guidelines. Those cases, however, are based on the commentary to Sentencing Guidelines § 4A1.2 or the Constitution. They are therefore inapposite to the statutory question discussed above. In any case, the Sentencing Commission has recently amended the commentary to Section 4A1.2 to state that "this guideline and commentary do not confer upon the defendant any right to attack collaterally a prior conviction or sentence beyond any such rights otherwise recognized in law (*e.g.*, 21 U.S.C. § 851 expressly provides that a defendant may collaterally attack certain prior convictions)." Guidelines § 4A1.2, Application Note 6 (Nov. 1, 1993). It is therefore clear that in future cases the Guidelines will not provide an independent basis for collateral attacks on prior convictions used for sentence enhancement.

only in the case of a grave structural error in the prior adjudication, such as a complete denial of the right to counsel, that renders the previous conviction inherently unreliable.

A. A Prior Conviction May Constitutionally Be Used For Sentence Enhancement Unless Its Use Would Be Arbitrary

One of the most familiar features of criminal sentencing is that repeat offenders are punished more severely than first-time offenders. "Statutes that punish recidivists more severely than first offenders have a long tradition in this country that dates back to colonial times." *Parke* v. *Raley*, 113 S. Ct. 517, 521 (1992).

> The propriety of inflicting severer punishment upon old offenders has long been recognized in this country and in England. * * * Statutes providing for such increased punishment were enacted in Virginia and New York as early as 1796, and in Massachusetts in 1804; and there have been numerous acts of similar import in many States.

Graham v. *West Virginia*, 224 U.S. 616, 623 (1912). Repeat-offender statutes and other sentence-enhancement schemes based on the offender's criminal background have now been enacted "in all the States, and by the Federal Government." *Spencer* v. *Texas*, 385 U.S. 554, 559 (1967) (footnote omitted). See also *Parke* v. *Raley*, 113 S. Ct. at 521-522.

Repeat-offender statutes do not impose additional punishment for the commission of the prior crimes. Rather, the enhanced punishment is properly understood as "a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." *Gryger* v. *Burke*, 334 U.S. 728, 732 (1948). Thus, the existence of a prior conviction merely affords a sentencing court "a reasonable basis for classification" of more serious offenders. *Graham* v. *West Virginia*, 224 U.S. at 630. See also *Moore* v. *Mis-*

souri, 159 U.S. 673, 678 (1895) ("the State may undoubtedly provide that persons who have been before convicted of crime may suffer severer punishment for subsequent offences than for a first offence against the law"). The constitutionality of such statutes, and of the general principle of imposing stiffer punishments upon repeat offenders, "is no longer open to serious challenge." *Oyler* v. *Boles*, 368 U.S. 448, 451 (1962).[9]

The freedom enjoyed by States and the federal government in using criminal history as a sentencing consideration is an application of the familiar principle that a sentencing court may consider a broad range of factors in determining the appropriate sentence without running afoul of the Due Process Clause. See, *e.g.*, *Wisconsin* v. *Mitchell*, 113 S. Ct. 2194, 2199 (1993); *Chapman* v. *United States*, 111 S. Ct. 1919, 1927 (1991); *United States* v. *Grayson*, 438 U.S. 41, 49-50 (1978); *Williams* v. *New York*, 337 U.S. 241, 246-247 (1949). A sentencing judge "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States* v. *Tucker*, 404 U.S. 443, 446 (1972); see 18 U.S.C. 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."). The only substantive limitation on the factors that a court may consider in sentencing is that the factors must not be arbitrary in

[9] This Court has sustained repeat-offender statutes "against contentions that they violate constitutional strictures dealing with double jeopardy, *ex post facto* laws, cruel and unusual punishment, due process, equal protection, and privileges and immunities." *Parke* v. *Raley*, 113 S. Ct. at 522, quoting *Spencer* v. *Texas*, 385 U.S. at 560.

relation to the goals of sentencing. See *Chapman* v. *United States*, 111 S. Ct. at 1927.

In light of those principles, a legislature seeking to enhance sentences based on past misconduct is not limited to prior convictions that the sentencing court certifies as valid. For example, a defendant's sentence may be enhanced based on prior criminal conduct for which he was never charged. See *Williams* v. *New York*, 337 U.S. at 244 (uncharged burglaries); *United States* v. *Dunnigan*, 113 S. Ct. 1111, 1118 (1993) (holding that a defendant's sentence may be enhanced if a court finds that he has committed perjury at trial, without the need for a separate perjury conviction). And a defendant may also be sentenced more severely based on findings of misconduct made by a court under the preponderance of the evidence standard, not by a jury beyond a reasonable doubt. See *McMillan* v. *Pennsylvania*, 477 U.S. 79, 91 (1986).

If a legislature may provide for sentence enhancement based on indicators of past misconduct falling short of what would be needed for a criminal conviction, it may rationally treat a prior conviction as a relevant sentencing factor without allowing a defendant to challenge that conviction based on any claim of error that would have been enough to call for reversal of the conviction on direct appeal. As in the case of other sentencing factors, the use of a prior conviction for enhancement is permissible as long as the use of the conviction is not arbitrary, either because it conveys a false picture of the defendant's criminal past, or because for some other reason it is inherently unreliable as an indicator of criminal history.

A prior conviction conveys a false picture of the defendant's past if, for example, the information about the defendant's prior convictions is "extensively and materially false." *Townsend* v. *Burke*, 334 U.S. 736, 741 (1948) (due process violated when defendant sentenced based on "assumptions concerning his criminal record which were materially un-

true"). A prior conviction is also unreliable as an indicator of criminal history if the conviction is void for all purposes because of a fundamental structural defect in the proceedings leading to the conviction.

The principal example of an unreliable prior conviction is an uncounseled felony conviction, which this Court has held may not be used for enhancement purposes. See *Burgett* v. *Texas*, 389 U.S. 109 (1967); *United States* v. *Tucker*, *supra*. Contrary to petitioner's argument (Br. 12-13), however, *Burgett* and *Tucker* do not stand for the proposition that a defendant may mount a collateral attack on the validity of a prior conviction on any basis whenever such a conviction is used for sentence enhancement in a later proceeding. The sentences in *Burgett* and *Tucker* were upset because they "depended upon the reliability of a past uncounseled conviction." *Lewis* v. *United States*, 445 U.S. at 67. The complete denial of counsel in a felony case implicates "the very integrity of the fact-finding process." *Linkletter* v. *Walker*, 381 U.S. 618, 639 (1965); accord *Mackey* v. *United States*, 401 U.S. 667, 693-694 (1971) (Harlan, J., concurring in judgments in part and dissenting in part). As this Court has explained, total deprivation of the right to counsel is a "structural defect[ ] in the constitution of the trial mechanism," and "[t]he entire conduct of the trial from beginning to end is obviously affected by the absence of counsel for a criminal defendant." *Arizona* v. *Fulminante*, 499 U.S. 279, 309-310 (1991). Because an uncounseled felony conviction so profoundly undermines confidence in the reliability of a criminal judgment, the Court has regarded the use of such a conviction for enhancement purposes as offending principles of due process.

The Court has never identified any other error as sufficient to disqualify a prior conviction from being considered in a sentence-enhancement proceeding. By analogy to the denial

of counsel, however, a defendant should be permitted to challenge prior convictions when he can point to a fundamental error that results in a "structural defect affecting the framework within which the trial proceeds." *Arizona* v. *Fulminante*, 499 U.S. at 310.[10] Where that kind of error is present, a defendant has been denied the "basic protections" without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." *Ibid.* And where a prior conviction is infected by a structural error that has effectively denied the defendant the basic elements of a trial, it is reasonable to conclude—by extension of the principles of *Burgett* and *Tucker*—that it would violate due process to use such a conviction for enhancement purposes.[11]

B. An Unrestricted Right To Collateral Relief From Prior Convictions Used For Sentencing Would Undermine Principles Of Finality

A defendant who contests a final judgment of conviction in a subsequent proceeding confronts the principle that when a defendant's "chance to appeal has been waived or exhausted, * * * [a court is] entitled to presume he stands fairly and finally convicted." *United States* v. *Frady*, 456 U.S. 152, 164 (1982). See also *Strickland* v. *Washington*, 466 U.S. 668,

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[10] In addition to the total denial of the right to counsel, this Court in *Fulminante* cited the denial of a trial before an impartial judge (see *Tumey* v. *Ohio*, 273 U.S. 510 (1927)) as constituting such an error. See 499 U.S. at 309-310.

[11] This analysis is entirely consistent with the Fourth Circuit's. That court held that a defendant may mount a collateral attack upon a prior conviction when he asserts a claim having the following two characteristics: (1) "prejudice can be presumed from the alleged constitutional violation, regardless of the facts of the particular case"; and (2) "the right asserted is so fundamental that its violation would undercut confidence in the guilt of the defendant." J.A. 149.

697 (1984) ("the presumption that a criminal judgment is final is at its strongest in collateral attacks on that judgment"). The presumption attaches, moreover, "even when a collateral attack on a final conviction rests on constitutional grounds." *Parke* v. *Raley*, 113 S. Ct. at 524.

As this Court recognized in *Parke* v. *Raley*, 113 S. Ct. at 523-524, principles of finality associated with habeas corpus actions apply with at least equal force when a defendant seeks to attack a previous conviction used for sentencing. When a defendant challenges a prior conviction used for sentencing, he is in effect mounting a collateral attack on that judgment. He is asking a federal court "to deprive the[ ] [state court judgment] of [its] normal force and effect in a proceeding that ha[s] an independent purpose other than to overturn the prior judgment[ ]." *Id.* at 523.

At a minimum, that means that when the defendant seeks to overturn the prior state court judgment on federal constitutional grounds, his right to do so should be no greater than the right that a state prisoner enjoys when he seeks to challenge his incarceration on constitutional grounds in federal court. A defendant convicted in state court usually may challenge his conviction on direct appeal, as well as in habeas corpus proceedings in state and federal court. If that prisoner has not exhausted his state remedies or has committed a procedural default under state law, a federal court, on direct or collateral review, may decline to hear his claims even though he alleges that his conviction violates the federal Constitution. See, *e.g.*, *Coleman* v. *Thompson*, 111 S. Ct. 2546 (1991); *Castille* v. *Peoples*, 489 U.S. 346 (1989); *Engle* v. *Isaac*, 456 U.S. 107 (1982); *Henry* v. *Mississippi*, 379 U.S. 443 (1965). At some point, a state court judgment becomes final and is no longer open to challenge on grounds that the defendant has not preserved.

If a defendant, by his conduct, can forfeit his right to bring a federal habeas corpus action challenging the primary effect

of his state court judgment—the execution of that judgment against him—it is anomalous to suggest that he is nonetheless perpetually free to challenge the collateral effects of that judgment when it is used by a federal court in sentencing. Not only has Congress failed to give the federal court any authority to issue the latter form of collateral relief, but the relief in question involves collateral consequences of the prior conviction that are entirely within the defendant's control. If a defendant has three prior convictions that qualify under 18 U.S.C. 924(e), he may avoid the relevant collateral consequences of those convictions by refraining from violating 18 U.S.C. 922(g). In light of those considerations, there is no reason to interpret the Due Process Clause to disregard any considerations of finality when the defendant seeks to challenge the effects of a state court conviction in a sentencing proceeding in federal court.

In fact, there are good reasons to give the presumption of regularity and finality even greater weight when a collateral attack occurs in the context of sentence enhancement. If a defendant is entitled in that context to challenge a prior, final conviction on grounds that require substantial judicial inquiry, it seriously undermines the objectives of repeat-offender schemes. Prior convictions offered for enhancement purposes will in many instances be from "another era from other States." *Loper* v. *Beto*, 405 U.S. 473, 500 (1972) (Rehnquist, J., dissenting). The remoteness of prior convictions may present insuperable obstacles to the prosecutor's successfully defending against even nonmeritorious collateral attacks. See *Parke* v. *Raley*, 113 S. Ct. at 524-525. "The States that rendered the convictions [will not be] parties to the [subsequent] * * * proceeding, and, of course, have no interest whatever in sustaining the validity of sentences long since served." *Loper* v. *Beto*, 405 U.S. at 500 (Rehnquist, J., dissenting).

Moreover, the court and counsel in the subsequent proceeding cannot "be expected to have any familiarity with the vagaries of criminal procedure" in the original rendering States. *Loper* v. *Beto*, 405 U.S. at 500 (Rehnquist, J., dissenting). The prior convictions may be decades old, and any surviving witnesses may well be "sufficiently distant from the location of the [later proceeding] as to render their voluntary appearance unlikely, and their compulsion by process impossible." *Ibid.* Finally, because the defendant may not have taken an appeal from the judgment against him and therefore may never have ordered a transcript of the proceedings leading to the previous conviction, the record of the previous case may be difficult or impossible to reconstruct. In such instances, a rule permitting a variety of challenges to a prior conviction would have the incongruous effect of making the least contested convictions the ones that would be hardest for the government to qualify for use in sentence-enhancement proceedings.[12]

These principles are especially applicable in cases in which the prior convictions are based on guilty pleas, because when a guilty plea is at issue, "the concern with finality * * * has special force." *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979) (footnote omitted). As the Court has explained,

[12] Petitioner suggests (Br. 38-41) that attacks on prior convictions could be efficiently resolved by placing the burden of proof on the defendant. While that approach would provide some degree of protection from abusive and burdensome collateral attacks, that safeguard is not sufficient. If a broad array of errors is cognizable in a sentence-enhancement proceeding, it will be much easier for a defendant to assert a claim of error (by simply testifying to the omission of some procedural requirement) than for the government to find evidence to rebut it. Given the often serious consequences of sentence enhancement, defendants will have strong incentives to testify to some procedural irregularity in the prior case.

"[i]nroads on the concept of finality tend to undermine confidence in the integrity of our procedures" and inevitably delay and impair the orderly administration of justice. *United States* v. *Addonizio*, 442 U.S. 178, 184 n.11 (1979). See also *Engle* v. *Isaac*, 456 U.S. at 127-128. The impact is greatest "when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas * * * [and because] the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea." *United States* v. *Timmreck*, 441 U.S. at 784. See also *Hill* v. *Lockhart*, 474 U.S. 52, 58 (1985).

Permitting a defendant to challenge a previous guilty plea conviction in a sentence-enhancement proceeding would be inequitable in many cases, particularly where the guilty plea was the product of plea bargaining. A defendant who has never had his underlying conviction set aside has obtained the advantages he bargained for as part of any plea agreement. He should not be allowed to retain those advantages while preventing the plea from being used to his disadvantage in a later sentencing proceeding. If such a defendant is permitted to mount a collateral attack on his prior conviction, the consequence is that the defendant's good deal becomes even better, while the State is not even given the theoretical opportunity of retrying him on the original charges, which it would have had if he had challenged his plea through habeas corpus.

Petitioner does not suggest any limit on the scope of the constitutional right he asserts to challenge prior convictions in sentencing proceedings. Since his position is that any conviction that is subject to invalidation may be challenged in a subsequent sentencing proceeding, his position would appear to require federal courts to consider any challenge that the

defendant cares to raise, regardless of whether it has ever been raised in the state courts, and even if it has been rejected by the state courts. In particular, to the extent that petitioner's constitutional argument turns on the question of the validity of the previous conviction, the logical consequence of his argument would appear to be that federal courts would be required to consider even state law challenges to prior state court convictions that are offered for use in federal sentencing proceedings. Such an expansive right of collateral attack on prior state court convictions would force federal courts to assume an exceptionally broad role in correcting both state and federal law errors committed by state courts in the course of reaching judgments that have already become final. It is difficult, to say the least, to find that the simple terms of the Due Process Clause require that result.

C. Repeat-Offender Schemes Have Traditionally Allowed Collateral Attacks On Prior Convictions Only On Limited Grounds

On the question whether due process compels sentencing courts to conduct plenary review of prior convictions used for sentence enhancement, the historical practice is instructive. See *Medina* v. *California*, 112 S. Ct. 2572, 2577 (1992) (finding past practice "probative" of whether a claimed procedural right is protected by the Due Process Clause on the ground that it is "so rooted in the traditions and conscience of our people as to be ranked as fundamental").

That practice provides no support for petitioner's assertion of a broad right to challenge the validity of prior convictions at sentencing. As this Court recognized last Term, "[f]or much of our history, it appears that state courts altogether prohibited defendants in recidivism proceedings from challenging prior convictions as erroneous, as opposed to void

for lack of jurisdiction." *Parke* v. *Raley*, 113 S. Ct. at 525.[13] Under the traditional approach, "the issue as to the first conviction [was] not whether appellant was therein properly convicted but whether as an affirmative matter he was finally convicted." *Vincent* v. *State*, 27 So.2d 556, 557 (Miss. 1946). In light of the traditional approach, the standard adopted by the Fourth Circuit—which allows courts to examine prior convictions for fundamental errors that render those convictions inherently unreliable—easily passes constitutional muster.

In addition, while contemporary legal practice is "of limited relevance to the due process inquiry" (*Medina* v. *California*, 112 S. Ct. at 2578), current practice also fails to establish the broad right of collateral review that petitioner claims. It is true that "[i]n recent years state courts have permitted various challenges to prior convictions" during repeat-offender proceedings. *Parke* v. *Raley*, 113 S. Ct. at 525. However, there is no uniform practice among the States regarding the circumstances in which such challenges must be allowed, and many of the state standards are consistent

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[13] See, *e.g.*, *Plumbly* v. *Commonwealth*, 43 Mass. (2 Met.) 413, 413 (1841) (Shaw, C.J.); *Kelley* v. *People*, 4 N.E. 644, 645-646 (Ill. 1886); *Latney* v. *United States*, 18 App. D.C. 265, 273-274 (1901); *State* v. *Webb*, 162 N.W. 358, 361 (N.D. 1917); *Lakomy* v. *People*, 178 P. 571, 572 (Colo. 1919); *Wesley* v. *Commonwealth*, 56 S.E.2d 362, 364 (Va. 1949); *People* v. *McCullough*, 89 N.E.2d 335, 337 (N.Y. 1949), cert. denied, 339 U.S. 924 (1950). See also 12 *Cyclopedia of Law & Procedure: Criminal Law* § 18, at 950 (1904). That principle, of course, reflects the more general rule that the judgment of a court of competent jurisdiction must be given effect unless it is set aside by the rendering court. See, *e.g.*, *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202-203 (1830) (Marshall, C.J.); T. Cooley, *Constitutional Limitations* 408-409 (1868).

with that of the Fourth Circuit in this case.[14] The federal courts of appeals, moreover, have also failed to adopt a uniform view.[15] The lack of any settled approach to the ques-

[14] For examples of the various standards, see, *e.g.*, *Fairbanks* v. *State*, 629 A.2d 63, 68 (Md. 1993) ("the defendant has no constitutional right to mount a collateral attack against a facially valid predicate conviction at the sentencing proceeding"); *Johnston* v. *State*, 829 P.2d 1179, 1181 (Wyo. 1992) ("defendant mounting a constitutional challenge to an underlying conviction * * * must make a prima facie showing that one or more of his underlying convictions was [unconstitutional]"); *Oliphant* v. *State*, 806 S.W.2d 215, 217 n.2 (Tenn. Crim. App.) ("a *facially* invalid judgment of conviction may not be used to enhance punishment"), appeal denied (Tenn. Mar. 11, 1991); *State* v. *Nowicki*, 474 N.W.2d 478, 483 (Neb. 1991) (defendant may not collaterally attack a prior conviction "beyond the issue of whether the defendant had counsel or waived the right to counsel"); *Lacy* v. *People*, 775 P.2d 1, 6 (Colo.) (en banc) ("A defendant attacking the constitutionality of a prior conviction in habitual criminal proceedings must make a prima facie showing that the guilty plea was unconstitutionally obtained."), cert. denied, 493 U.S. 944 (1989); *State ex rel. Collins* v. *Superior Court*, 754 P.2d 1346, 1351 (Ariz. 1988) (en banc) ("Where the record shows a defendant was previously convicted while represented by counsel, he may not collaterally attack the validity of that conviction when it is alleged for enhancement purposes."); *England* v. *State*, 530 N.E.2d 100, 103 (Ind. 1988) ("the accused may challenge the predicate felony conviction * * * when (1) the court records reflecting the proceeding which led to the prior conviction, on their face, raise a presumption that the conviction is constitutionally infirm, and (2) the apparent constitutional infirmity is of the type which undermines both the integrity and reliability of the determination of guilt").

[15] The federal courts have taken a variety of positions on the right to challenge prior convictions used for sentence enhancement. Compare, *e.g.*, *United States* v. *Vea-Gonzales*, 999 F.2d 1326, 1333 (9th Cir. 1993) (Constitution requires sentencing courts generally to hear collateral attacks on prior convictions used for sentencing) with *United States* v. *Roman*, 989 F.2d 1117, 1120 (11th Cir. 1993) (en banc) (per curiam) (courts must entertain challenges only if prior conviction is "presumptively void"), petition for cert. pending, No. 93-5464; *United States* v. *Isaacs*, No. 92-2129 (1st Cir. June 22, 1993), slip op. 15-16 (same); and *United States* v. *Elliott*, 992 F.2d 853, 857 (8th Cir. 1993) (courts must

tion presented in this case undercuts petitioner's contention that the Due Process Clause guarantees him a broad right to challenge his prior convictions at sentencing. Cf. *Parke* v. *Raley*, 113 S. Ct. at 525 (the "range of contemporary state practice" undermines claim that a particular state practice is fundamentally unfair); *Spencer* v. *Texas*, 385 U.S. at 566 (tolerance for "a spectrum of state procedures dealing with [repeat offenders] is especially appropriate" in light of the diversity of state practices).

D. Petitioner's Claims Do Not Require The Sentencing Court To Entertain A Collateral Attack On His Prior Convictions

Petitioner seeks to challenge his 1985 Maryland state court burglary conviction on the ground that his attorney did not render effective assistance in connection with his guilty plea. In particular, petitioner argues that his counsel in the 1985 case did not advise him of the potential defense of voluntary intoxication. Petitioner seeks to challenge his 1989 Maryland state court conviction on the ground that he was not advised of the rights he was waiving by agreeing to a "stipulated facts" trial. Neither claim alleges a fundamental structural defect in the prior conviction; petitioner's sentence accordingly was not based on inherently unreliable adjudications the use of which denied him due process.

1. *The 1985 Maryland State Court Conviction*

With respect to his 1985 conviction, petitioner claims that his lawyer rendered ineffective assistance in advising him about whether to plead guilty. That claim does not go to a structural flaw in the proceedings against petitioner that would

hear challenges to prior convictions only if the alleged constitutional infirmity undermines a conviction's reliability as an indicator of guilt or "erodes the principle" of the case relied on for the underlying claim of error), petition for cert. pending, No. 93-5570.

render the resulting judgment inherently unreliable. To be sure, an ineffective-assistance-of-counsel claim bears on the question whether the defendant has received a fair trial. But that question is quite distinct from the question whether the alleged error so undermines the reliability of the conviction that Congress may not treat a prior, final state court conviction as a rational sentencing factor without giving a defendant the right to litigate the claim, even though the claim was not previously raised on appeal or in independent collateral proceedings challenging the prior conviction.

This Court has explained that "[a]ttorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial." *Strickland* v. *Washington*, 466 U.S. at 693. Where a guilty plea is involved, the interest in finality is greater, and "the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised." *Hill* v. *Lockhart*, 474 U.S. at 58. A defendant challenging his guilty plea accordingly must establish not only constitutionally ineffective lawyering, but also "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59.[16] That is an inquiry that lends itself to manipulation by defendants who have nothing to lose by claiming that their attorney failed to advise them of a particular fact and that they would not have pleaded guilty with full information.

In sum, claims of ineffective assistance of counsel may rise to the level of reversible error, but they do not render a prior

[16] This, in turn, will frequently require a prediction about the effect an attorney error might have had upon the trial. For example, where an attorney fails to advise his client of a possible defense, the prejudice inquiry "depend[s] largely on whether the affirmative defense likely would have succeeded at trial." *Hill* v. *Lockhart*, 474 U.S. at 59.

conviction "presumptively void," *Burgett* v. *Texas*, 389 U.S. at 115, as is true in the case of a complete denial of counsel. Not only are ineffective-assistance-of-counsel claims highly fact-intensive,[17] but they often simply mirror claims of trial error that were not preserved for review. There is therefore no reason to conclude that such claims are equivalent to the complete deprivation of counsel. In light of the strong presumption of finality that attaches to a conviction entered pursuant to a guilty plea, the very heavy burden on a defendant seeking to overturn such a conviction, and the infrequency with which claims of ineffective assistance of counsel are found to have merit, Congress may rationally treat a prior final conviction as a pertinent sentencing factor without first allowing the defendant to litigate any ineffective-assistance-of-counsel claim that he could have but did not raise on direct appeal or in a separate collateral proceeding.

2. *The 1989 Maryland State Court Conviction*

Petitioner claims that his 1989 conviction was invalid because it resulted from a "stipulated facts" trial, and because he was not advised of the rights he was waiving by agreeing

[17] Petitioner argues (Br. 32-33) that it is not possible to evaluate the total denial of the right to counsel from the face of a conviction. According to petitioner, a *Gideon* claim is inherently fact-intensive, because it will always involve the question of waiver. In *Burgett*, however, the state court record indicated that the defendant had not had counsel in the prior case, which was decided prior to *Gideon*. Thus, "it was reasonable to presume that the defendant had not waived a right he did not possess." *Parke* v. *Raley*, 113 S. Ct. at 524. And in most instances, the inquiry into representation will not be difficult to conduct: most felony defendants are represented, and in those cases in which representation is waived, courts typically are careful to ensure that a record of the waiver is made and preserved.

to that procedure.[18] That claim is based on this Court's decision in *Boykin* v. *Alabama*, 395 U.S. 238 (1969), which requires state courts to place on the record facts showing that a defendant who pleads guilty is aware of the rights he is waiving by entering that plea. Even assuming that a stipulated facts trial is the functional equivalent of a guilty plea (but see *Adams* v. *Peterson*, 968 F.2d 835, 839-842 (9th Cir. 1992) (en banc), cert. denied, 113 S. Ct. 1818 (1993)), an alleged violation of the prophylactic requirements of *Boykin* does not rise to the level of fundamental structural error equivalent to the deprivation-of-counsel claims in *Burgett* and *Tucker*.

First, in *Parke* v. *Raley*, 113 S. Ct. at 523, this Court held that *Boykin*'s prophylactic protections do not extend to collateral attacks on final convictions. The procedures set forth in *Boykin* are not themselves constitutional requirements, much less essential components of a criminal trial without which the trial cannot serve as a reliable device for resolving guilt or innocence. Instead, the requirements of *Boykin* are merely prophylactic rules designed to safeguard certain rights that are implicated when a defendant enters a guilty plea. Thus, a *Boykin* error, even if one occurred in this case, would

[18] Petitioner also claimed that he was denied effective assistance of counsel in connection with the 1989 conviction, because he was convicted of attempted burglary rather than attempted breaking and entering. For the reasons discussed with respect to petitioner's 1985 state court conviction, a claim of ineffective assistance of counsel should not be available when a defendant raises it for the first time when a prior conviction is used for sentencing. In any event, it is difficult to see how that alleged error has made any difference here, since the state court has corrected its judgment in that regard, and since both the district court and the court of appeals held that petitioner was subject to sentencing under the ACCA regardless of whether his state conviction was for attempted burglary or attempted breaking and entering.

not justify a collateral challenge to the use of the 1989 conviction for enhancement purposes.

Second, this Court's decisions under Fed. R. Crim. P. 11, which governs plea proceedings in the federal courts, indicate that *Boykin* claims should not be cognizable in a collateral attack such as the one at issue in this case. As *Boykin* does for state court judges, Rule 11 requires federal judges to address defendants who wish to plead guilty, in order to ensure that the defendants understand the nature and consequences of their pleas. The purpose of Rule 11 is the same as the purpose that underlies *Boykin*'s "on-the-record advisement" requirement for guilty pleas. See *Brady* v. *United States*, 397 U.S. 742, 749 n.6 (1970); *Boykin* v. *Alabama*, 395 U.S. at 246-247 (Harlan, J., dissenting). Because a defendant's guilty plea waives "his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers," Rule 11 seeks to ensure that his plea is truly voluntary and to create an adequate record for any post-conviction challenge. *McCarthy* v. *United States*, 394 U.S. 459, 466 (1969). In *McCarthy*, which was decided just two months before *Boykin*, this Court enforced the prophylactic requirements of Rule 11 by reversing a conviction on direct review because the district judge had not inquired into the defendant's understanding of the charges, as required by Rule 11. 394 U.S. at 472.

The Court subsequently made clear that Rule 11 violations, although they implicate the process by which the voluntariness of a guilty plea is assured, do not call into question the fundamental fairness of the underlying conviction.[19] In contrast with its treatment of cases involving the

[19] Indeed, the Court in *McCarthy* made explicit that it was not resting its decision on constitutional grounds, and it emphasized that Rule 11 had not been held to be constitutionally required. 394 U.S. at 464-465.

right to counsel under *Gideon* v. *Wainwright, supra,* the Court gave *McCarthy* only prospective application. See *Halliday* v. *United States,* 394 U.S. 831 (1969) (per curiam).[20] Although this Court has never spoken to the issue, the courts of appeals have likewise declined to apply *Boykin* retroactively.[21] This is strong evidence that violations of the prophylactic rules of *Boykin* and Rule 11 are not the kind of errors that inherently undercut the reliability of guilty pleas. Cf. *Linkletter* v. *Walker,* 381 U.S. at 639 ("in each of the three areas in which we have applied our rule retrospectively, the principle that we applied went to the fairness of the trial—the very integrity of the fact-finding process") (footnote omitted).

Finally, in *United States* v. *Timmreck, supra,* the Court held that a violation of Rule 11's prophylactic requirements, without more, is not cognizable on collateral review. The defendant in *Timmreck* asserted that a Rule 11 violation had occurred because the district court accepted his plea without informing him of a mandatory special parole term. In holding that the defendant's claim was not cognizable under 28 U.S.C. 2255, the Court explained that a formal violation of Rule 11 "is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure." 441 U.S.

[20] The Court explained that although strict compliance with Rule 11 gave greater assurance that the plea was voluntary, the issue of voluntariness could be raised independently of Rule 11. *Halliday* v. *United States,* 394 U.S. at 832-833. Hence, the retroactivity of *McCarthy* was not essential to make certain that a guilty plea was in fact voluntary.

[21] See, *e.g., Berry* v. *Mintzes,* 726 F.2d 1142, 1146 (6th Cir.), cert. denied, 467 U.S. 1245 (1984); *United States* v. *Pereira,* 574 F.2d 103, 105 n.5 (2d Cir.), cert. denied, 439 U.S. 847 (1978); *Mathis* v. *Hocker,* 459 F.2d 988, 989 (9th Cir. 1972); *Dominguez* v. *Henderson,* 447 F.2d 207, 209 (5th Cir. 1971) (citing cases); *Meller* v. *Missouri,* 431 F.2d 120, 124 (8th Cir. 1970), cert. denied, 400 U.S. 996 (1971).

at 783. For the same reason, a formal violation of the prophylactic requirements of *Boykin* should not be regarded as the kind of error that can be raised when a prior conviction is used for enhancement purposes in a subsequent prosecution, particularly where, as here, the defendant is attempting to apply *Boykin*'s prophylactic protections in the context of a stipulated facts trial rather than a guilty plea. Compare *Boykin* v. *Alabama,* 395 U.S. at 242 (finding it significant that "a plea of guilty is more than an admission of conduct; it is a conviction"). The court of appeals therefore properly refused to recognize a constitutional right for petitioner to challenge his prior convictions on either of the grounds he raised at sentencing in the district court.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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October Term, 1993

DARREN J. CUSTIS,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court of Appeals
For The Fourth Circuit

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT:

1. The ACCA does not limit consideration of federal constitutional challenges 1
2. The structural defect test is not a threshold test for federal constitutional challenges 5
3. Even if the structural defect test were appropriate, respondent's arguments would not defeat petitioner's claims 7
4. Challenges to prior convictions can be adjudicated fairly and efficiently 10
5. The presumption of regularity does not require imposition of a more severe sentence based on an unconstitutional conviction 12
6. State historical tradition is not instructive 15
7. Respondent's arguments would keep relevant information from the sentencing court 18
8. A remand is necessary to decide petitioner's claims 19

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES:

Argersinger v. Hamlin, 407 U.S. 25 (1972) 16

Arizona v. Fulminante, 499 U.S. 279 (1991) 5, 8, 10

Baldasar v. Illinois, 446 U.S. 222 (1980) 6

Ballentine v. State, 445 A.2d 1033 (Md. 1982) 13

Bifulco v. United States, 447 U.S. 381 (1980) 4

Boykin v. Alabama, 395 U.S. 238 (1969) ..... *passim*

Brady v. United States, 397 U.S. 742 (1970) 9, 10

Burgett v. Texas, 389 U.S. 109 (1967) ..... *passim*

Dickerson v. New Banner Inst., Inc., 460 U.S. 103 (1983) 4

Dowling v. United States, 473 U.S. 207 (1985) 4

Duncan v. Louisiana, 391 U.S. 145 (1968) 7, 16

Dunn v. Commonwealth, 703 S.W.2d 874 (Ky. 1985), *cert. denied*, 479 U.S. 832 (1986) 17

Gideon v. Wainwright, 372 U.S. 335 (1963) ..... *passim*

Henderson v. Morgan, 426 U.S. 637 (1976) 9

Hill v. Lockhart, 474 U.S. 52 (1985) 9

Johnson v. State, 439 A.2d 542 (Md. 1982) 12

Johnson v. Zerbst, 304 U.S. 458 (1938) 9

Kimmelman v. Morrison, 477 U.S. 365 (1986) 8, 13

Lewis v. United States, 445 U.S. 55 (1980) 1, 2

Malloy v. Hogan, 378 U.S. 1 (1964) 16

TABLE OF AUTHORITIES – Continued

Page

McCarthy v. United States, 394 U.S. 459 (1969) 9

McMillan v. Pennsylvania, 477 U.S. 79 (1986) 18, 19

Medina v. California, 112 S. Ct. 2572 (1992) 15, 16

North Carolina v. Alford, 400 U.S. 25 (1970) 10

Parke v. Raley, 113 S. Ct. 517 (1992) 11, 14

Patterson v. New York, 432 U.S. 197 (1977) 15

People v. Crump, 422 N.E.2d 815 (N.Y. 1981) 13

People v. Harris, 459 N.E.2d 170 (N.Y. 1983) 17

People v. Montiel, 855 P.2d 1277 (Cal. 1993) 13

People v. Sumstine, 687 P.2d 904 (Cal. 1984) 17

Pointer v. Texas, 380 U.S. 400 (1965) 16

Ramsey v. United States, 569 A.2d 142 (D.C. 1990) 13

State v. Beloit, 844 P.2d 18 (Ida. 1992) 17

State v. Branch, 743 P.2d 1187 (Utah 1987), *cert. denied*, 485 U.S. 1036 (1988) 17

State v. Chervenell, 662 P.2d 836 (Wash. 1983) 17

State v. O'Neil, 580 P.2d 495 (N.M. App. 1978) 17

State v. Shelton, 621 So.2d 769 (La. 1993) 17

Strickland v. Washington, 466 U.S. 668 (1984) 8, 19

Thrall v. Wolfe, 503 F.2d 313 (7th Cir. 1974), *cert. denied*, 420 U.S. 972 (1975) 4

United States v. Bradshaw, 999 F.2d 798 (4th Cir. 1993), *petition for cert. filed*, (October 21, 1993) (No. 93-6448) 5

TABLE OF AUTHORITIES – Continued

Page

United States v. Dunnigan, 113 S. Ct. 1111 (1993)..18, 19

United States v. Ferguson, 935 F.2d 862 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 907 (1992) 11

United States v. Gallman, 907 F.2d 639 (7th Cir. 1990), *cert. denied*, 499 U.S. 908 (1991)..... 12

United States v. Paleo, 967 F.2d 7 (1st Cir. 1992)..... 14

United States v. Taylor, 882 F.2d 1018 (6th Cir. 1989), *cert. denied*, 496 U.S. 907 (1990) 12

United States v. Tucker, 404 U.S. 443 (1972)..... *passim*

Washington v. Texas, 388 U.S. 14 (1967) 16

Williams v. New York, 337 U.S. 241 (1949).....18, 19

STATUTES AND REGULATIONS:

Armed Career Criminal Act of 1984..... *passim*

18 U.S.C. § 921(a)(20).....2, 4

18 U.S.C. § 922(g) 1, 2

18 U.S.C. § 922(n) 2

18 U.S.C. § 924(e) ..... *passim*

18 U.S.C. App. § 1202 (repealed).....1, 2

18 U.S.C. § 3553(e) 17

18 U.S.C. § 3661..... 18

18 U.S.C. § 5021 (repealed) 4

Cal. Penal Code § 1203.4 (1993)..... 4

D.C. Code Ann. § 23-111(c)(2) (1993)..... 17

TABLE OF AUTHORITIES – Continued

Page

D.C. Code Ann. § 24-806 (1993)..... 4

Md. Ann. Code art. 27, § 645A(a) (1992) 13

Minn. Stat. Ann. § 242.31 (1993) 4

United States Sentencing Commission, *Guidelines Manual*, § 4A1.2 (Nov. 1993) 3, 19

United States Sentencing Commission, *Guidelines Manual*, § 4A1.3 (Nov. 1993) 17, 19

ARGUMENT

1. The ACCA does not limit consideration of federal constitutional challenges.

Respondent argues that the language of the ACCA "does not authorize" constitutional challenges when prior convictions are offered as grounds for the statutory minimum fifteen-year sentence. Resp. Br. 15-16. Respondent concedes, however, that "the Due Process Clause bar[s] the government from using the simple fact of conviction as a basis for sentence enhancement" if the prior convictions were "obtained without the basic elements necessary to a reliable judgment." Resp. Br. 16. Thus, even under respondent's view, the ambiguity of statutory silence must be interpreted as allowing some challenges in order to avoid creating a constitutional defect in the ACCA itself. The absence of express statutory authorization therefore proves nothing.

a. Ignoring the fact that its own argument requires consideration of some constitutional challenges, respondent claims that under *Lewis v. United States*, 445 U.S. 55 (1980), the absence of an express statutory authorization should be read as foreclosing such challenges. Resp. Br. 14-15. *Lewis* held that an uncounseled conviction could properly serve as a basis for a regulatory prohibition against possession of firearms by a felon under 18 U.S.C. App. § 1202(a)(1), the predecessor statute to Section 922(g)(1).[1] In so holding, the Court reaffirmed *United States v. Tucker*, 404 U.S. 443, 448-49 (1972) and *Burgett v. Texas*, 389 U.S. 109, 115 (1967), which established that unconstitutional convictions cannot be used as a basis for sentencing enhancement. *Lewis*, 445 U.S. at 67. *See* Pet. Br.

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[1] The very challenge this Court held could not be asserted in *Lewis* is one that respondent acknowledges in this case *must* be permitted under the ACCA. Resp. Br. 20.

12-13. The reasoning of *Burgett* and *Tucker* was inapplicable, the Court explained, because Congress' regulatory purpose in prohibiting possession of firearms by a felon focuses "not on reliability, but on the mere fact of conviction, or even indictment," and because Section 1202(a) created a firearms disability, not a sentencing enhancement scheme. *Lewis*, 445 U.S. at 67.[2] Given that the Court expressly distinguished the regulatory prohibition in *Lewis* from sentencing enhancements like the one in this case, respondent's reliance on *Lewis* is misplaced.[3]

b. Finding nothing in the statute forbidding constitutional challenges, respondent relies exclusively on a negative implication from 18 U.S.C. § 921(a)(20), which states that "[a]ny conviction which has been expunged, or

[2] Congress enacted Section 1202(a) and its companion legislation to keep firearms away from potentially dangerous persons, and therefore made the mere pendency of indictment a disabling circumstance, even if the defendant was never convicted. *Lewis*, 445 U.S. at 67. It logically followed that the more significant fact of conviction was "a sufficient basis on which to prohibit possession of a firearm," whether the conviction was valid or not. *Id.* at 66. Under current law, a person under indictment continues to be prohibited from possessing firearms. 18 U.S.C. § 922(n). Indictment does not, however, trigger the mandatory minimum sentence under Section 924(e).

[3] Contrary to respondent's claim (Resp. Br. 15-16), there is textual support for the different meanings of the term "convicted" in Section 922(g)(1) and the term "convictions" in Section 924(e). Section 924(e)(2)(C) expressly provides that the term "conviction" includes certain acts of juvenile delinquency; no similar language applies to Section 922(g). In any event, the terms have different meanings under respondent's own position, as some constitutional errors would defeat application of Section 924(e), but not Section 922(g)(1). Moreover, unlike in sentencing enhancement schemes, the firearms disability "attaches immediately upon the defendant's first conviction." *Lewis*, 445 U.S. at 67.

set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter." Respondent interprets this language to mean that convictions which have not been set aside can be counted. Resp. Br. 13. Respondent apparently believes that Congress added the sentence it relies on *solely* for a negative implication. When that sentence was added in 1986, there was no dispute that convictions previously vacated or reversed on federal constitutional grounds could not be used for sentencing enhancement. Thus, respondent interprets the provision as a completely superfluous exemption enacted solely to signal Congress' unspoken intent that prior convictions *not* previously set aside *could* be counted. In light of the settled law and established practice of allowing constitutional challenges at sentencing enhancement proceedings (Pet. Br. 19), this Court should not assume that Congress would strain so hard to avoid saying what it meant. Had Congress intended to abrogate the widespread federal law and practice, it would have made that intent express.

Respondent's supposition that Congress used the phrase "conviction which has been * * * set aside" to refer to convictions previously vacated or reversed on federal constitutional grounds is incorrect. The term "set aside" has a different meaning: "A number of jurisdictions have various procedures pursuant to which previous convictions may be set aside or the defendant may be pardoned for reasons unrelated to innocence or errors of law." United States Sentencing Commission, *Guidelines Manual*, § 4A1.2, comment. (n.10) (Nov. 1993). It is far more likely that Congress intended the term "set aside" to refer to such procedures.[4] Alternatively, Congress may have

[4] For example, the now-repealed Federal Youth Corrections Act provided for setting aside convictions for reasons unrelated

intended the phrase "has been set aside" to forbid counting of state-court convictions previously invalidated on state-law grounds. When Section 921(a)(20) was enacted, *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 122 (1983), and *Thrall v. Wolfe*, 503 F.2d 313, 316 (7th Cir. 1974), *cert. denied*, 420 U.S. 972 (1975), could be read as implying that such convictions might be counted.

Respondent offers no answer to the clear legislative history showing that Section 921(a)(20) was enacted in 1986 for the specific purpose of abrogating *Dickerson* and *Thrall* by requiring federal courts to follow state law in excluding certain state convictions from consideration. *See* Pet. Br. 22-23. Thus, the language on which respondent relies was included to *narrow*, not enlarge, what qualifies as a conviction. That purpose is inconsistent with respondent's argument that the provision broadened the penalty provision in Section 924(e).[5]

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to errors of law. *See* 18 U.S.C. § 5021(a) & (b) (conviction automatically set aside when offender discharged before expiration of maximum sentence or discharged from probation prior to expiration of maximum period of probation) (repealed). Similar procedures are provided under some state statutes. *E.g.*, Cal. Penal Code § 1203.4 (1993); D.C. Code Ann. § 24-806 (1993); Minn. Stat. Ann. § 242.31 (1993).

[5] If the Court finds that the term "convictions" is ambiguous after resort to the language, structure, and legislative history of the ACCA, then the rule of lenity should be applied. *Bifulco v. United States*, 447 U.S. 381, 387 (1980). When two alternatives are possible in the construction of a criminal statute, the rule of lenity provides that the Court will not choose the harsher alternative unless Congress made its intent apparent through use of "language that is clear and definite." *Dowling v. United States*, 473 U.S. 207, 214 (1985) (citation omitted).

2. The structural defect test is not a threshold test for federal constitutional challenges.

Rather than attempting to defend the test adopted by the court of appeals, respondent offers its own standard for evaluating whether claims of constitutional violations should be heard by federal sentencing courts.[6] According to respondent, use of a prior conviction as grounds for a mandatory minimum sentence is impermissible if the conviction is "void for all purposes because of a fundamental structural defect in the proceedings leading to the conviction." Resp. Br. 20. This proposal to limit constitutional review is untenable. This Court has never held in any context that only structural defects merit review, nor suggested that the structural defect test should be applied as a threshold test to bar consideration of entire categories of claims.

Respondent's argument is based on the supposition that the structural defect test identifies constitutional errors that undermine the reliability of a prior conviction. *See* Resp. Br. 16-17. That supposition is false. This Court adopted the structural defect test in *Arizona v. Fulminante*, 499 U.S. 279,

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[6] Contrary to respondent's argument (Resp. Br. 21 n.11), the structural defect test it proposes is not consistent with the opinion of the court of appeals in this case. As explained in a subsequent opinion of the court of appeals, the "test" announced in this case permits review at most of *only* three constitutional violations: (1) complete denial of counsel, (2) adjudication by a biased judge; and (3) direction of a guilty verdict by the court. *United States v. Bradshaw*, 999 F.2d 798, 800 (4th Cir. 1993), *petition for cert. filed*, (October 21, 1993) (No. 93-6448). Structural defects are not limited to these three errors. *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991) (identifying other errors that are structural in nature).

309-10 (1991), for a very different purpose: to identify constitutional errors that warrant automatic reversal of a conviction without application of harmless error analysis. To say that structural defects cannot be harmless does not, as respondent implies, establish that other constitutional violations have no bearing on the reliability of resulting convictions. It offends due process to require a federal court to count a prior conviction for enhancement that it finds is unreliable. A harmful error – whether structural or not – undermines the reliability of the resulting conviction and requires recognition for that reason. The government's concession that unreliable convictions may not be used to enhance a sentence (Resp. Br. 16) cannot logically be confined to those resulting from structural defects.

The suggestion that a limiting test such as structural error is necessary to stem the tide of constitutional challenges is in any event misguided. Under *Burgett v. Texas*, 389 U.S. 109, 114-115 (1967) and *United States v. Tucker*, 404 U.S. 443, 449 (1972), the use of state convictions resulting from federal constitutional violations is forbidden because it would erode the underlying constitutional right and force the accused in effect to suffer anew from the deprivation of that right.[7] The protections afforded

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[7] *See also Baldasar v. Illinois*, 446 U.S. 222 (1980) (per curiam) (uncounseled misdemeanor conviction may not be used to convert subsequent misdemeanor into felony with enhanced prison term). Although the increased prison sentence imposed in this case does not constitute an enlargement of the sentence for a prior offense, the five-fold increase in the sentence (from approximately three to four years without the ACCA enhancement to nearly twenty years as a result of the ACCA) was imposed as a direct consequence of that conviction. Use of the prior conviction resulted in a completely different range of sentencing options, eliminating the statutory *maximum* of ten years and requiring a statutory *minimum* of fifteen years. Thus, the 235 month sentence Mr. Custis actually received would not

defendants under the Bill of Rights apply to the states by incorporation only if the right in question "is fundamental to the American scheme of justice." *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). Tempered by considerations of reliability, harmless error analysis, assignment of the burden of proof to the defendant, and the considerable latitude given to district courts handling ACCA proceedings, the requirement that the challenge be based on a federal constitutional right that applies to the states is sufficient in itself to screen unworthy claims.

Contrary to respondent's assertion, a decision in petitioner's favor would not require federal courts to entertain an unlimited array of claims, including "even state law challenges to prior state court convictions that are offered for use in federal sentencing proceedings." Resp. Br. 26. *Burgett* and *Tucker* limit use of convictions stemming from violations of federal constitutional rights. The logic of those cases extends no further.

3. Even if the structural defect test were appropriate, respondent's arguments would not defeat petitioner's claims.

a. Respondent acknowledges that a conviction obtained in violation of the right to counsel is a structural error which "so profoundly undermines confidence in the reliability of a criminal judgment" that it may not be used for enhancement purposes. Resp. Br. 20. Nevertheless, respondent contends that convictions obtained in violation of the right to effective assistance of counsel should automatically count for sentencing enhancement. Resp. Br. 30-31. That contention ignores the law governing the

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have been authorized but for counting the prior conviction for enhancement.

right to effective assistance of counsel and must, therefore, fail.[8]

Violation of the right to effective assistance of counsel fits squarely into the category of structural defects. Structural defects are defects in the "constitution of the trial mechanism." *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991). Such defects require automatic reversal of the conviction because they "affect[] the framework within which the trial proceeds." *Id.* at 310. In contrast to structural defects, trial errors "occur[] during the presentation of the case to the jury" and can "be quantitatively assessed in the context of other evidence presented in order to determine" the effect on the trial. *Id.* at 307-308.

This Court has expressly recognized that an ineffective assistance claim "asserts the absence of one of the crucial assurances that the result of the proceeding is reliable * * * * " *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Ineffective assistance of counsel is established only if the conviction "resulted from a breakdown in the adversary process that renders the result unreliable." *Id.* at 687. "[C]ounsel's errors [must be] so serious as to deprive the defendant of a fair trial * * * * " *Id.*; *see also Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986) ("The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect."). When

[8] Respondent argues that "the infrequency with which claims of ineffective assistance of counsel are found to have merit" shows that the district court need not consider any such claims. Resp. Br. 31. This attempt to distinguish ineffective assistance claims from *Gideon* claims based on their relative merit is flawed. Although it is true that only some ineffective assistance claims will have merit, the same is true of *Gideon* claims. *See* Pet. Br. 32.

attorney incompetence takes place during a guilty plea proceeding, the error is even more structural, because it deprives the defendant of a trial altogether. The defendant must show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). This constitutional error therefore affects not only the framework, but the entire nature of the proceeding.

In sum, because ineffective assistance of counsel upsets the adversarial system and renders the result unreliable, it "affect[s] the framework within which the trial proceeds" and is properly treated as a structural defect. Thus, even under respondent's test, the claim qualifies for review.

b. The acceptance of an unknowing and involuntary guilty plea is also a structural defect. A guilty plea constitutes a waiver of the very right to trial, and with it the right to a jury's determination of guilt after confrontation of adverse witnesses. *See Brady v. United States*, 397 U.S. 742, 748 (1970). It is axiomatic that such a waiver is valid only if it constitutes "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *see also Henderson v. Morgan*, 426 U.S. 637, 645 (1976) (plea cannot support a judgment of guilt unless it was voluntary and intelligent). If the "guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void." *McCarthy v. United States*, 394 U.S. 459, 466 (1969) (citations omitted). *Accord Boykin v. Alabama*, 395 U.S. 238, 243 n.5 (1969).[9]

[9] In this case, Custis not only asserted that *Boykin* was not satisfied; in addition, relying on a transcript showing that he was not advised of his defenses and was confused during the

Like other structural defects, it is impossible to assess the effect of an unknowing guilty plea "in the context of other evidence presented" in order to determine its effect. An unknowing and involuntary plea is not a trial error that "occur[s] during the presentation of the case to the jury." Such a plea not only denies a defendant basic trial protections, but prevents the conduct of a trial altogether. Therefore, under the analysis set forth in *Arizona v. Fulminante*, 499 U.S. at 307-10, an unknowing and involuntary plea is a "structural defect affecting the framework" of the proceeding and warrants review even under respondent's test. *Id.* at 310.

4. Challenges to prior convictions can be adjudicated fairly and efficiently.

Respondent argues that allowing constitutional challenges would "seriously undermine" the objectives of repeat offender schemes because convictions offered under the ACCA may be remote, and records and witnesses in the previous case may be unavailable. In such cases, respondent claims that the government would have difficulty "qualifying" the convictions for use in sentencing enhancement proceedings. Resp. Br. 23-24. What respondent ignores, however, is that the eight federal circuits which entertain constitutional challenges under the ACCA have uniformly placed the burden of proof on the

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proceeding, Custis asserted that his 1985 guilty plea "was not knowing and intelligent," that "he was unable to 'rationally weigh the advantages of going to trial against the advantages of pleading guilty,' " and that his guilty plea "did not represent 'a voluntary and intelligent choice among the alternative courses of action open to him.' " Def. Memo. 2/26/92, Docket No. 42, pp. 2 & 5, quoting *Brady*, 397 U.S. at 750; *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). Respondent ignores this claim.

defendant. *See* cases cited in Pet. Br. at 39. As this Court recognized in *Parke v. Raley*, 113 S. Ct. 517, 524 (1992), "serious practical difficulties will confront [the] party assigned [the] evidentiary burden." If relevant evidence is unavailable, the defendant will be unable to satisfy his burden of proof and his constitutional challenge will fail.

Conceding that allocation of the burden of proof to the defendant provides "some degree of protection" to the government, respondent contends that defendants will simply testify to "some procedural irregularity" in the previous case, which will be difficult for the government to rebut. Resp. Br. 24 n.12. Respondent is unable to point to a single manifestation of this purported problem in the eight circuits that have allowed constitutional challenges since enactment of the ACCA in 1984.[10]

That failure is hardly surprising, for respondent's concerns are unfounded. As an initial matter, the court could refuse to entertain the defendant's challenge if his alleged "procedural irregularity" did not rise to the level of a federal constitutional violation. Moreover, even constitutional claims based solely on a defendant's uncorroborated, self-serving testimony would likely be decided against him. The finder of fact is entitled to wholly disbelieve the testimony of an interested witness, and this principle is frequently followed in ACCA proceedings.[11]

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[10] The same failure of the 20 amici states is similarly revealing, because 17 of them are in federal circuits that allow constitutional challenges to prior convictions offered for sentencing enhancement under the ACCA. Despite this fact, amici are unable to point to any instance in which federal court review of prior convictions has had any impact on them whatsoever.

[11] *E.g., United States v. Ferguson*, 935 F.2d 862, 866-67 (7th Cir. 1991) (defendant's affidavit insufficient to establish

Thus, a district court could quickly reject a defendant's claim under the circumstances imagined by respondent. In any event, the fact that relief should not be granted in the absence of a persuasive showing of a constitutional infirmity provides no reason to eliminate review in cases where such a showing is made.[12]

5. The presumption of regularity does not require imposition of a more severe sentence based on an unconstitutional conviction.

Respondent argues that the presumption of regularity supports automatic imposition of a mandatory minimum sentence, regardless of whether convictions may have been obtained in violation of the right to effective assistance of counsel and through unknowing and involuntary pleas. Resp. Br. 21-23. That argument is predicated in part on the assumption that a defendant asserting such a claim "could have but did not raise [the claim] on direct appeal or in a separate collateral proceeding." Resp. Br. 31. In Maryland, as elsewhere, a claim of ineffective assistance of counsel is not usually cognizable on direct appeal. *Johnson v. State*, 439 A.2d 542, 559 (Md. 1982);

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invalidity of convictions), *cert. denied*, 112 S. Ct. 907 (1992); *United States v. Gallman*, 907 F.2d 639, 643 (7th Cir. 1990) (discounting defendant's self-serving affidavit in course of rejecting claim), *cert. denied*, 499 U.S. 908 (1991); *United States v. Taylor*, 882 F.2d 1018, 1031 (6th Cir. 1989) (rejecting as "incredible" defendant's assertion that he did not understand waivers during plea proceeding), *cert. denied*, 496 U.S. 907 (1990).

[12] Nor do the difficulties imagined by the government exist in this case. The convictions challenged here were relatively recent and took place in Baltimore courts. J.A. 10, 43. Custis's claims were not based solely on his own testimony, but rather are supported by transcripts he submitted to the district court.

Kimmelman v. Morrison, 477 U.S. 365, 378 (1986) (no meaningful opportunity to raise ineffectiveness claims on direct review).[13] The same will often be true of a claim that a guilty plea was not knowingly and voluntarily made. *Ballentine v. State*, 445 A.2d 1033, 1036 (Md. 1982) (appellate record often insufficient to determine voluntariness of guilty plea). A post-conviction petition will not always furnish an alternative means of review, because courts refuse to consider such petitions unless the defendant is in custody or on probation or parole in connection with the conviction at issue. Md. Ann. Code art. 27, § 645A(a) (1992).[14]

In any event, respondent's argument is inconsistent with *Burgett* and *Tucker*, neither of which imposed any requirement that a defendant attack his conviction in state proceedings before he faces enhanced sentencing. In both cases, the Court held the use of the prior uncounseled convictions impermissible even though the defendant had not sought to have them overturned in the jurisdiction of conviction. *Burgett*, 389 U.S. at 112-113; *Tucker*, 404 U.S. at 444-45.

Moreover, respondent's argument fails to recognize that in the context of mandatory minimum sentencing under the ACCA, the defendant does not seek to overturn a prior conviction, but rather endeavors to present the court with information about the constitutional violations which led to the conviction. In so doing, the defendant

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[13] *See also People v. Montiel*, 855 P.2d 1277, 1294 (Cal. 1993); *People v. Crump*, 422 N.E.2d 815, 816 (N.Y. 1981); *Ramsey v. United States*, 569 A.2d 142, 146 (D.C. 1990).

[14] No such petition would have been allowed with respect to Custis's 1989 conviction for which he received a two-year suspended sentence. J.A. 47-48. Moreover, the time to challenge the prior convictions will normally have expired prior to the entry of a third conviction.

does not seek to overturn the state conviction, free himself from state custody, or otherwise interfere with the state's authority. *United States v. Paleo*, 967 F.2d 7, 12 (1st Cir. 1992) (rejecting exhaustion requirement in ACCA proceedings). Review of state court convictions in this limited context, with the burden of proof on the defendant, does not erode principles of finality.[15]

Respondent also asserts that allowing courts to consider constitutional challenges where a conviction was the product of an agreement to plead guilty would inequitably make a "defendant's good deal become[] even better." Resp. Br. 25. That argument wrongly assumes that the use of the prior conviction as a basis for a mandatory minimum sentence in the event of a subsequent conviction was a term of the plea agreement. The record contains nothing to suggest that petitioner agreed to any such term. The transcripts of petitioner's plea proceedings clearly show that he was not given notice

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[15] Respondent's reliance on *Parke v. Raley*, 113 S. Ct. 517 (1992) (Resp. Br. 22) is misplaced. In *Parke*, the Court explained that "the presumption of regularity that attaches to final judgments makes it appropriate to assign a burden of proof to the defendant." *Id.* at 524 (citation omitted). The Court did not rule, however, that the presumption of regularity is conclusive and irrebuttable. Instead, the Court approved a state sentencing enhancement scheme that permitted constitutional challenges to prior convictions but placed the burden of proving unconstitutionality on the defendant. This Court has never indicated that the presumption of regularity requires federal courts automatically to preclude entire categories of claims from consideration.

Respondent also claims that this Court held *Boykin's* protections inapplicable to collateral proceedings in *Parke*. Resp. Br. 32. This characterization is mistaken. In *Parke*, this Court declined to reach the government's argument that *Boykin* challenges need not be heard at all in sentencing enhancement proceedings. *Parke*, 113 S. Ct. at 522-23.

that the convictions could trigger a mandatory minimum fifteen-year sentence in the event of a subsequent conviction. J.A. 10-42, 43-48. Whether or not the prior conviction subsequently results in imposition of a mandatory minimum sentence, the advantages and disadvantages of the prior "deal" remain unchanged for both sides.

6. State historical tradition is not instructive.

Relying on *Medina v. California*, 112 S. Ct. 2572 (1992), respondent argues that there is no state historical tradition of reviewing constitutional infirmities in prior convictions used for sentencing enhancement and, therefore, that foreclosing such review does not violate due process. Resp. Br. 26-29. Respondent makes no attempt to reconcile this argument with *Burgett* and *Tucker*, or even its own structural defect test, all of which are inconsistent with respondent's argument.

Medina is simply inapplicable here.[16] Unlike the defendant in *Medina*, petitioner neither challenges state rules of criminal procedure nor relies solely on the general guarantee of due process. *Id.* at 2576. Rather, his claims are based on rights specifically enumerated in the Constitution, whose applicability to the states is settled.

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[16] In *Medina*, this Court rejected a challenge to California's procedural practices for determining competence to stand trial. In deciding whether the burden of proof scheme violated the Due Process Clause, the Court looked in part to whether it " 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " *Medina* 112 S. Ct. at 2577 (quoting *Patterson v. New York*, 432 U.S. 197, 201-202 (1977)). The Court also examined "the operation of the challenged rule, and our precedents," and evaluated "whether the rule transgresses any recognized principle of 'fundamental fairness' in operation." *Id.* at 2577-78.

Moreover, the absence of an historical tradition of considering challenges like petitioner's during sentencing enhancement proceedings is not instructive. The pertinent provisions of the Bill of Rights became applicable to the states in contemporary times,[17] after the state court decisions on which respondent relies. *See* Resp. Br. 27 n.13. That states did not permit challenges based on rights that were inapplicable to them shows only that there is no relevant historical practice to consider. *Cf. Medina*, 112 S. Ct. at 2582 (O'Connor and Souter, JJ., concurring). The logic of respondent's argument would allow nullification of a host of this Court's precedents decided over the last thirty years, including *Gideon* itself.[18]

In arguing (Resp. Br. 27-28) that there is no uniform contemporary practice regarding consideration of constitutional challenges, respondent omits any mention that courts in the First, Third, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have uniformly permitted

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[17] The Sixth Amendment rights were made applicable to the States as follows: right to counsel, *Gideon v. Wainwright*, 372 U.S. 335 (1963); confrontation, *Pointer v. Texas*, 380 U.S. 400 (1965); compulsory process, *Washington v. Texas*, 388 U.S. 14 (1967); trial by jury in non-petty cases, *Duncan v. Louisiana*, 391 U.S. 145 (1968). The Fifth Amendment right against self-incrimination was applied to the states in *Malloy v. Hogan*, 378 U.S. 1 (1964). *Burgett* and *Tucker* made clear that use of convictions obtained in violation of specific federal rights constitutes another violation of those rights and must be prevented so that the federal right is not eroded. *Burgett*, 109 U.S. at 114-15; *Tucker*, 404 U.S. at 449.

[18] At common law, the right to counsel was available in misdemeanor but not in felony cases. *Argersinger v. Hamlin*, 407 U.S. 25, 46 (1972) (Powell, J., concurring).

defendants to challenge the constitutionality of convictions offered for enhancement under the ACCA.[19] In addition, respondent fails to acknowledge that, following *Burgett* and *Tucker*, the lower federal courts entertained a variety of constitutional challenges to prior convictions offered for sentencing enhancement before adoption of the ACCA. Pet. Br. 19.[20]

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[19] *See* cases cited in Pet. Br. 13-14. Ignoring all cases under the statute at issue here, respondent focuses exclusively on cases governed by the provisions of the sentencing guidelines. Resp. Br. 28 n.15. In guidelines cases, the counting of an unconstitutional conviction can be cured by granting a downward departure on grounds that the defendant's criminal history category over-represents the seriousness of his criminal history or the likelihood that he will commit further crimes. United States Sentencing Commission, *Guidelines Manual*, § 4A1.3 (Nov. 1993). No similar amelioration is available under the ACCA. If a mandatory minimum sentence is required, the court is not permitted to depart below it. 18 U.S.C. § 3553(e) (no departure below mandatory minimum unless defendant provides substantial assistance in investigation and prosecution of others).

[20] Respondent notes that five states restrict review of prior convictions for sentencing enhancement, and two states permit challenges if the defendant makes a prima facie showing that one of the convictions was unconstitutional. Resp. Br. 28 n.14. The states that require a prima facie showing of unconstitutionality support Custis's position in this case. Many other states also allow constitutional challenges to prior convictions offered for sentencing enhancement. *See, e.g., People v. Sumstine*, 687 P.2d 904 (Cal. 1984); D.C. Code Ann. § 23-111(c)(2) (1993); *State v. Beloit*, 844 P.2d 18 (Ida. 1992); *Dunn v. Commonwealth*, 703 S.W.2d 874 (Ky. 1985), *cert. denied*, 479 U.S. 832 (1986); *State v. Shelton*, 621 So.2d 769 (La. 1993); *State v. O'Neil*, 580 P.2d 495 (N.M. App. 1978); *People v. Harris*, 459 N.E.2d 170 (N.Y. 1983); *State v. Branch*, 743 P.2d 1187 (Utah 1987), *cert. denied*, 485 U.S. 1036 (1988); *State v. Chervenell*, 662 P.2d 836 (Wash. 1983).

7. Respondent's arguments would keep relevant information from the sentencing court.

Respondent contends that because sentencing courts are permitted to consider a broad range of information, including prior misconduct for which a defendant was not prosecuted, it follows that a sentencer may rely on prior convictions to trigger a mandatory minimum sentence, even if they were obtained in violation of the right to effective assistance of counsel or through an unknowing and involuntary plea. Resp. Br. 19. Because respondent's position would ultimately restrict rather than broaden the sentencing inquiry, that argument betrays the very principles on which it is based.

Contrary to respondent's argument, the statutory mandate that "[n]o limitation shall be placed on the information * * * which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence" (18 U.S.C. § 3661), supports consideration of claims that prior convictions resulted from constitutional violations.[21] In *United States v. Tucker*, 404

[21] Respondent relies on *Williams v. New York*, 337 U.S. 241 (1949), *United States v. Dunnigan*, 113 S. Ct. 1111 (1993), and *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), for the proposition that sentencing enhancements need not be "limited to prior convictions that the sentencing court certifies as valid." Resp. Br. 19. None of those cases suggests that sentencing courts should consider unconstitutional convictions. On the contrary, all focus on actual *conduct* of the defendant, as found by the sentencing court. *Williams*, 337 U.S. at 244 (uncharged burglaries); *Dunnigan*, 113 S. Ct. at 1118 (perjury at trial); *McMillan*, 477 U.S. at 81 (visible possession of firearm). Because the enhancement in those cases did not result from unconstitutional convictions, this Court's decisions in *Burgett* and *Tucker* were not implicated.

Permitting constitutional challenges is fully consistent with the broad-ranging consideration of a defendant's conduct

U.S. 443, 447 (1972), this Court explained that a sentence based in part on uncounseled convictions was "founded at least in part upon misinformation of constitutional magnitude." In this case, the government proposes to preclude the district court from considering information that prior convictions stem from similarly grave constitutional infirmities. Respondent's argument that the district court must ignore information directly relevant to the reliability of those convictions and the background of the defendant is inconsistent with the statutory prohibition against limitation of the information a sentencing court may receive and consider.

8. A remand is necessary to decide petitioner's claims.

Respondent mischaracterizes the record in contending that the district court "initially determined that the performance of petitioner's attorney in the 1985 case did not fall below the level of professional competence required under *Strickland*." Resp. Br. 6. The district court expressly ruled that counsel's performance "*could* constitute performance below the applicable standards of professional competence" under *Strickland*. Order, 2/27/92, Docket No. 46, p. 1 (emphasis added). The court withheld decision on the constitutionality of this conviction

approved in *Williams*, *Dunnigan*, and *McMillan*. A finding that the prior conviction is constitutionally invalid would not prevent the court from enhancing the defendant's sentence based on an independent finding that the defendant actually committed the underlying offense. If the court so found, the sentencing guidelines would permit an upward departure based on the conclusion that the defendant's criminal history score underrepresented the seriousness of his criminal history. United States Sentencing Commission, *Guidelines Manual*, §§ 4A1.2, Comment. (n. 6); 4A1.3 (Nov. 1993).

because it intended to hear testimony before deciding whether there was a reasonable probability that, but for counsel's errors, Custis would have insisted on a trial. *Id.* at 2. Prior to the sentencing hearing, the district court reversed its position, decided not to consider the claims at all, and refused to take evidence in support of them. Because neither court below made a final determination of the merits of Custis's claims, the merits of the claims are not before this Court. A remand is therefore required.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed and the case remanded for resentencing.

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No. 93-5209

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

DARREN J. CUSTIS,

Petitioner,

v.

UNITED STATES

Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICI CURIAE 1

QUESTION PRESENTED 2

SUMMARY OF ARGUMENT 2

ARGUMENT

I. LIMITING CONSTITUTIONAL CHALLENGES TO PREDICATE STATE CONVICTIONS IN FEDERAL SENTENCING PROCEEDINGS TO CASES IN WHICH "PREJUDICE" MAY BE PRESUMED FROM THE ALLEGED CONSTITUTIONAL VIOLATIONS PROPERLY BALANCES THE DEFENDANT'S INTEREST IN RELIABLE SENTENCING WITH THE STATE'S INTEREST IN THE FINALITY OF ITS JUDGMENTS 3

II. LIMITING CONSTITUTIONAL CHALLENGES TO PREDICATE STATE CONVICTIONS IN FEDERAL SENTENCING PROCEEDINGS TO CASES IN WHICH "PREJUDICE" MAY BE PRESUMED FROM THE ALLEGED CONSTITUTIONAL VIOLATIONS ACCORDS PROPER "FULL FAITH AND CREDIT" TO STATE CONVICTIONS 8

III. LIMITING CONSTITUTIONAL CHALLENGES TO PREDICATE STATE CONVICTIONS IN FEDERAL SENTENCING PROCEEDINGS TO CASES IN WHICH "PREJUDICE" MAY BE PRESUMED FROM THE ALLEGED CONSTITUTIONAL VIOLATIONS PROPERLY MINIMIZES INCREASED BURDENS ON THE STATE THAT OTHERWISE WOULD EXIST TO SUPPORT THE VALIDITY OF ITS CONVICTIONS 11

CONCLUSION 13

TABLE OF AUTHORITIES

Page

Addonizo v. United States, 442 U.S. 178 (1979) 7

Allen v. McMurry, 449 U.S. 90 (1980) 9

Burgett v. Texas, 389 U.S. 109 (1967) 2, 4, 5

Castille v. Peoples, 489 U.S. 346 (1986) 7

Coleman v. Thompson, 501 U.S. ____ ,
112 S.Ct. 1845 (1992) 8

Davis v. Davis, 305 U.S. 32 (1938) 10

Duckworth v. Serrano, 454 U.S. 1 (1981) 7

Engle v. Isaac, 456 U.S. 107 (1982) 7, 13

Gideon v. Wainwright, 372 U.S. 445 (1963) 4, 5

Johnson v. Zerbst, 304 U.S. 458 (1938) 7

Kimmelman v. Morrison, 477 U.S. 365 (1986) 5

Krener v. Chemical Const. Corp., 456 U.S. 461 (1982) 9

Kuhlman v. Wilson, 477 U.S. 436 (1986) 12

Lewis v. United States, 445 U.S. 55 (1980) 4, 5

Linkletter v. Walker, 381 U.S. 61 (1965) 4

Marshall v. Lonberger, 459 U.S. 422 (1988) 6

Menna v. New York, 423 U.S. 61 (1975) 6

Migra v. Warren City School Dist. Bd. of Educ.,
465 U.S. 75 (1984) 9

Page

Murray v. Carrier, 477 U.S. 478 (1986) 8

Parke v. Raley, ____ U.S. ____ ,
113 S.Ct. 517 (1992) 6, 7

Rose v. Lundy, 455 U.S. 509 (1982) 12

Spencer v. Texas, 385 U.S. 554 (1967) 4

Stone v. Powell, 428 U.S. 465 (1976) 5

Strickland v. Washington, 466 U.S. 668 (1984) 5

United States v. Bradshaw,
999 F.2d 798 (4th Cir. 1993) 6, 8

United States v. Custis,
988 F.2d 1355 (4th Cir. 1993) 5

United States v. Frady, 456 U.S. 152 (1982) 7

United States v. Jones, 907 F.2d 456 (4th Cir. 1990),
cert. denied, 498 U.S. 1029 (1991) 9, 10, 11

United States v. McGlocklin, No. 91-1621,
____ F.3d ____ (6th Cir. September 17, 1993),
WL 356406 (*en banc*) 10

United States v. Paleo, 967 F.2d 7 (1st Cir. 1992) 11

United States v. Timmreck, 441 U.S. 780 (1979) 6

United States v. Tucker, 404 U.S. 443 (1972) 2, 4, 5

Wainwright v. Sykes, 433 U.S. 72 (1977) 13

Wisconsin v. Mitchell, ____ U.S. ____ ,
113 S.Ct. 2194 (1993) 3

Page

STATUTES

18 U.S.C. §924(e) 4, 9

28 U.S.C. §851 ..... 4, 9

28 U.S.C. §1738 ..... 8, 9, 10

28 U.S.C. §2254 9

Pages Ohio Revised Code §2743.48 12

INTEREST OF AMICI CURIAE

Amici States obtain thousands of criminal convictions each year, and must defend those convictions on direct appeal, in post-conviction relief actions, and later in one or more habeas corpus proceedings. These convictions are the result of extensive and careful work done by police officers, prosecutors, and other personnel. The States' central interests in protecting the public and securing redress and justice for the victims of crime depend upon an orderly process that assures the finality of its criminal convictions. Except where constitutional requirements for due process are implicated, a constitutional challenge to a predicate state conviction during federal sentencing proceedings violates the principles of comity and federalism and is contrary to the presumption of regularity that attaches to final judgments.

Allowing collateral challenges to predicate state convictions impermissibly requires the States to passively witness attacks on their final judgments despite the full faith and credit that otherwise is owed those judgments. The attacks will take place in federal courts that are removed in time and place from the actual convictions. The federal courts and federal prosecutors may not even notify the States prior to a ruling upon the convictions. In the alternative, the States may feel themselves obligated to defend such convictions, thereby bearing the considerable burden of activity to ensure that their judgments are upheld. This burden may well consist of providing extensive documentation, finding witnesses, and advising and participating in hearings.

If a state judgment is judged invalid in a federal sentencing process, the State predictably will bear the burden of defending actions brought by the defendant in habeas corpus, post-conviction relief, or parole revocation hearings based upon the federal court's ruling that the underlying conviction was invalid. The defendant also may bring suit in wrongful imprisonment and on other related civil claims. Even if many of these suits ultimately are unsuccessful, the inevitable costs of defending them will impose additional and significant burdens on the State.

QUESTION PRESENTED

WHETHER THE UNITED STATES CONSTITUTION REQUIRES A DISTRICT JUDGE TO HOLD A HEARING ON A CONSTITUTIONAL CHALLENGE TO A PREDICATE STATE CONVICTION USED FOR ENHANCEMENT OF A FEDERAL SENTENCE IN CASES IN WHICH THE ALLEGED CONSTITUTIONAL CHALLENGE IS NOT ONE FOR WHICH "PREJUDICE" IS PRESUMED TO EXIST.

SUMMARY OF ARGUMENT

In *Burgett v. Texas*, 389 U.S. 109 (1967) and *United States v. Tucker*, 404 U.S. 443 (1972), the Court expounded on a constitutionally mandated exception to the traditional rule that a prior conviction can be considered for the purpose of an enhanced punishment. The reason for such exception is that a uncounseled conviction undermines the very integrity of the factfinding process and thus makes consideration of that conviction in the sentencing process inherently unreliable. Such a limited exception, however, does not require that all merely alleged claims of constitutional violation must be considered and rejected by a federal sentencing judge before a final state conviction may be considered for enhancement purposes.

While prejudice may be presumed to exist from an outright denial of counsel, the same prejudice is not presumed to exist from many other allegations of constitutional error.

The Fourth Circuit's holding in this case properly balances the defendant's right to reliable sentencing and a state's important interests in the finality of its convictions. It is appropriate to limit challenges to final state convictions solely to those cases where prejudice may be presumed to exist, for such an approach respects and preserves the presumption of regularity that attends final judgments. Allowing broad-based constitutional attacks on final state judgments in federal sentencing proceedings would implicate accepted principles of comity and federalism, and undermine the integrity of state procedures.

In addition, the Fourth Circuit's limited review accords proper deference to the constitutional principles of the Full Faith and Credit Clause. Absent statutory waiver, which is not present here, or a waiver that is constitutionally required in order to protect the reliability of the federal sentencing process, a final state court judgment should be respected by a federal court exactly because it is "final."

Allowing full-scale challenges to state convictions merely because a constitutional allegation has been made would impose significant practical burdens on the States. States, at best, will be required to provide documentation or witnesses to support such convictions, which will often be difficult to identify and obtain because of the passage of time. At worst, the state will be required to defend collateral litigation, much of which may be frivolous, that will be engendered by a facile reopening of final state convictions in federal sentencing proceedings. In the process, the notion that a trial — rather than endless collateral review — is the main event in our criminal justice system would be further and unjustifiably diminished.

ARGUMENT

I. LIMITING CONSTITUTIONAL CHALLENGES TO PREDICATE STATE CONVICTIONS IN FEDERAL SENTENCING PROCEEDINGS TO CASES IN WHICH "PREJUDICE" MAY BE PRESUMED FROM THE ALLEGED CONSTITUTIONAL VIOLATIONS PROPERLY BALANCES THE DEFENDANT'S INTEREST IN RELIABLE SENTENCING WITH THE STATE'S INTEREST IN THE FINALITY OF ITS JUDGMENTS.

In *Wisconsin v. Mitchell*, ____ U.S. ____, 113 S.Ct. 2194 (1993), this Court reiterated that a sentencing court may take a large variety of factors into account in determining an appropriate sentence. The question in this case is whether the Constitution requires a federal sentencing judge to hold a hearing on all alleged constitutional challenges to a final state court conviction before the judge may consider such conviction in imposing the sentence. Obviously, the Congress, as it has

done in other contexts, *see, e.g.*, 21 U.S.C. §851, could impose such a limitation as a matter of statutory law. However, Congress has not enacted any language that would command such a result under the Armed Career Criminal Act, 18 U.S.C. §924(e). Thus, any limitation on the power of a federal sentencing judge to consider a predicate state offense for sentencing purposes — without first holding a hearing on any alleged constitutional challenge to that conviction — derives, if at all, from the Constitution itself. The Constitution does not require, as a *per se* rule, that final state convictions may not be considered in federal sentencing simply because any "constitutional challenge" is being asserted to that state conviction.

In *Burgett v. Texas*, 389 U.S. 109 (1967), this Court held that during recidivist proceedings, the admission of a prior criminal conviction which was constitutionally infirm under the standards of *Gideon v. Wainwright*, 372 U.S. 445 (1963), denied the defendant his constitutionally protected right to a fair trial. And, in *United States v. Tucker*, 404 U.S. 443 (1972), this Court reaffirmed that "[t]o permit a conviction obtained in violation of *Gideon v. Wainwright* to be used against a person either to support guilt or enhance punishment for another offense . . . is to erode the principle of that case." *Tucker*, 404 U.S. at 449 (*quoting Burgett v. Texas*, 389 U.S. at 114). In both cases, this Court identified the interests at stake as the fundamental unreliability of a completely uncounseled conviction for sentencing purposes. The subsequent conviction or sentence in each case depended upon the reliability of a past uncounseled conviction. *See Lewis v. United States*, 445 U.S. 55, 57 (1980). In sentencing terms, the conviction could not be relevant or material to proper sentencing, since on its face it did not necessarily establish guilt. *See Spencer v. Texas*, 385 U.S. 554 (1967). The total denial of counsel was held to implicate and impeach "the very integrity of the fact finding process." *Linkletter v. Walker*, 381 U.S. 61 (1965).

It certainly does not follow, however, that all alleged constitutional violations have the same effect on the reliability of a predicate state conviction. This Court has noted on many occasions that convictions may be overturned on Fourth Amendment grounds for reasons that are wholly extraneous

even to whether the evidence excluded was probative, much less to whether the guilt of the defendant has been undermined. *Stone v. Powell*, 428 U.S. 465 (1976) (barring habeas review of alleged violations of the Fourth Amendment where the defendant had a "full and fair" hearing in state court). In *Lewis v. United States, supra*, the Court even approved an uncounseled conviction as a predicate for a subsequent conviction for possession of a firearm by a convicted felon. Indeed, the Court held that there was a rational connection between any prior conviction and the potential dangerousness of the defendant.

In the present case, the district court declined to consider Custis' challenge to the constitutional validity of his predicate state convictions. Custis claimed that one predicate conviction for burglary was obtained as a result of unconstitutionally ineffective assistance of counsel and that another conviction for attempted breaking and entering was obtained as a result of a constitutionally defective guilty plea.

In affirming the decision of the district court not to entertain challenges to the predicate convictions in this case, the court of appeals distinguished the *Gideon* violations at issue in *Burgett* and *Tucker* from the violations alleged by Custis. Unlike uncounseled convictions, which, on their face, presumptively affect the reliability of the guilt-determining process, the claims made by Custis do not, *per se*, call into question the defendant's guilt. *United States v. Custis*, 988 F.2d 1355, 1361 (4th Cir. 1993).

A claim of ineffective assistance of counsel, if shown, is a constitutional violation. Yet it does not, by mere allegation, presumptively affect the reliability of a state conviction. *Cf. Kimmelman v. Morrison*, 477 U.S. 365, 390-91 (1986). In such a case, a finding of guilt will be overturned only after a fact-intensive hearing, in which counsel's performance is judged against the standard of whether the outcome would have been materially altered. *Strickland v. Washington*, 466 U.S. 668 (1984). And a guilty plea — which is a direct admission of guilt — will be presumed proper upon collateral review, and will be reversed, again, only after a fact-intensive showing by the defendant that prejudice exists under the circumstances.

Parke v. Raley, ____ U.S. ____, 113 S.Ct. 517 (1992). When a guilty plea is at issue, "the concern with finality . . . has special force." *United States v. Timmreck*, 441 U.S. 780 (1979). This is so because a "counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case." *Menna v. New York*, 423 U.S. 61, 62 n.2 (1975); *Marshall v. Lonberger*, 459 U.S. 422 (1988).

Accordingly, the court of appeals held that "district courts are obliged to hear constitutional challenges to predicate state convictions in federal sentencing proceedings only when prejudice can be presumed from the alleged constitutional violation, regardless of the facts of the particular case; and when the right asserted is so fundamental that its violation would undercut confidence in the guilt of the defendant." *Id.* at 1362. *See also United States v. Bradshaw*, 999 F.2d 798 (4th Cir. 1993), *petition for cert. filed Oct. 21, 1993* (No. 93-6448), wherein the Court of Appeals for the Fourth Circuit elaborated on its test:

> . . . a district court must consider (1) whether prejudice can be "presumed" from the alleged constitutional violation regardless of the facts *and,* conjunctively, (2) whether the right asserted is "so fundamental" that its violation would undermine the court's confidence in the defendant's guilt. In conducting this two-part inquiry, district courts cannot "presume prejudice" beyond the four categories of error that *Rose* lists as "necessarily render[ing] a trial unfair." 478 U.S. at 577, 106 S.Ct. at 3106. Within the *Rose* categories, district courts may further restrict collateral challenges to those fundamental errors that have not been subjected to harmless-error analysis by the Supreme Court or the published views of this tribunal.

Id. at 800.

The holding of the court of appeals in this case properly balances the fundamental right of an accused to reliable

sentencing and the State's important interests in the finality of its judgments. Allowing a criminal defendant to attack predicate state convictions beyond the present holding of the court of appeals would adversely affect interests of comity and federalism and is destructive of both the presumption of regularity of state judgments and the finality of state convictions.

It is a well-settled principle of law that the judgment of a court of competent jurisdiction is presumed to be proper until the contrary appears. *Parke v. Raley, supra; Johnson v. Zerbst*, 304 U.S. 458 (1938). When a defendant's "chance to appeal has been waived or exhausted, . . . [a court is] entitled to presume he stands fairly and finally convicted." *United States v. Frady*, 456 U.S. 152, 164 (1982).

This Court has repeatedly recognized the interests of comity and federalism that underlie our dual federal-state judicial systems. *See, e.g., Engle v. Isaac*, 456 U.S. 107 (1982). Review of a final state court conviction by the federal system necessarily implicates those interests. As the Court has stated, "inroads on the principle of finality tend to undermine confidence in the integrity of our procedures." *Addonizo v. United States*, 442 U.S. 178, 184-85 (1979).

Even in federal habeas corpus proceedings, where a collateral challenge to a state conviction is allowed, this Court has given consideration to the societal costs of such review. For example, before a state court conviction can be challenged on application for a federal writ of habeas corpus, the defendant must have exhausted his remedies in state court. *Castille v. Peoples*, 489 U.S. 346 (1989). As this Court has emphasized, it "would be unseemly in our dual system of government for the federal courts to upset a state-court conviction without affording the state courts the opportunity to correct a constitutional violation." *Duckworth v. Serrano*, 454 U.S. 1, 4 (1981).

Similarly, a habeas corpus petitioner who cannot present his constitutional challenge in state court, because of a procedural default, will be deemed to have waived it for federal habeas corpus purposes except in a few limited circumstances. Indeed, unless the petitioner can demonstrate cause for the procedural

default and actual prejudice resulting from the alleged constitutional error, or that failure to consider the claim will result in a fundamental miscarraige of justice, no federal review will be permitted at all. *Coleman v. Thompson,* 501 U.S. ____ , 112 S.Ct. 1845 (1992); *Murray v. Carrier,* 477 U.S. 478 (1986).

Collateral challenges to predicate state convictions during federal sentencing proceedings would undermine the interests of comity, federalism, and finality even more so than in habeas corpus review. The district court may be hearing challenges to state court judgments that are final because such convictions have never been challenged. Even if a challenge has been raised at all, the constitutional claims may never have been presented. If a constitutional doctrine of "reliable sentencing" would require a hearing on any asserted constitutional claim, then the federal sentencing court would undertake review of state convictions unfettered by these limitations. The traditional legal doctrines of finality of judgments, exhaustion of remedies, and waiver and default, which have been carefully and painstakingly devised to protect the State's interests in collateral review, may be utterly ignored. In contrast, the Fourth Circuit's holdings in this case and in *Bradshaw, supra,* respect and preserve these doctrines and make appropriate accommodation to the rights of the accused. The Court is urged to preserve that balance by affirming the court of appeals here.

II. LIMITING CONSTITUTIONAL CHALLENGES TO PREDICATE STATE CONVICTIONS IN FEDERAL SENTENCING PROCEEDINGS TO CASES IN WHICH "PREJUDICE" MAY BE PRESUMED FROM THE ALLEGED CONSTITUTIONAL VIOLATIONS ACCORDS PROPER "FULL FAITH AND CREDIT" TO STATE CONVICTIONS.

28 U.S.C. §1738 sets forth in pertinent part:

> Such Acts, records, and judicial proceedings [of any state] or copies thereof, so authenticated shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the court of such State, Territory or Possession from which they are taken.

In addition to properly balancing the State's interest in the finality and presumption of regularity of its proceedings, the Fourth Circuit's standard for collateral review of a predicate state conviction in federal sentencing proceedings also accords proper deference to the overarching commands of "full faith and credit."

The Full Faith and Credit Clause of the United States Constitution, as implemented by 28 U.S.C. §1738, mandates that the judicial proceedings of a state court be accorded the same full faith and credit in the federal court that they enjoy by law or usage in the courts of the state from which they are taken. *See, e.g., Migra v. Warren City School Dist. Bd. of Educ.,* 465 U.S. 75 (1984); *Allen v. McMurry,* 449 U.S. 90 (1980). Since a final judgment of conviction generally would be accorded respect and a strong presumption of regularity in a state court, the Full Faith and Credit Clause commands that it be accorded the same status in federal sentencing proceedings.

There may, of course, be exceptions to this rule. Exercising its discretion, Congress has limited the effect of 28 U.S.C. §1738 by authorizing collateral attacks on prior state convictions in certain circumstances. *See, e.g.,* 28 U.S.C. §2254 (federal habeas corpus proceedings); 21 U.S.C. §851 (sentence enhancement for certain drug offenses). However, a partial repeal of the Full Faith and Credit Statute cannot be inferred, but must be clearly and manifestly found in a coordinate federal statute. *Krener v. Chemical Const. Corp.,* 456 U.S. 461 (1982).

As pointed out previously, the Armed Career Criminal Act, 18 U.S.C. §924(e), contains no statement of congressional intent that the Full Faith and Credit Statute is to be ignored. *United States v. Jones,* 907 F.2d 456 (4th Cir. 1990), *cert. denied,* 498 U.S. 1029 (1991).

Nor do the federal sentencing guidelines contain any clear statement of congressional intent that a final judgment of a state court may be collaterally attacked and invalidated for the

purpose of sentencing. *United States v. McGlocklin,* No. 91-1621, ____ F.3d ____ (6th Cir. Sept. 17, 1993), WL 356406 (*en banc*). Thus, again, if any exception is to be made here to the governing principles of "Full Faith and Credit," it must arise from the Constitution itself, or not at all. Except where constitutional requirements for due process are implicated, state court judgments are entitled to "full," *i.e.,* complete, faith and credit pursuant to the Constitution and 28 U.S.C. §1738. *See Davis v. Davis,* 305 U.S. 32 (1938). But due process does not itself require a full hearing on any alleged constitutional challenge to a predicate state conviction in a federal sentencing proceeding. Instead, a trial sentencer may take into account a judgment of conviction of a state court which has become final because it has never been directly challenged on the grounds now belatedly asserted in the collateral federal proceeding.

It is sophistry to argue that, when a federal court holds a final state judgment to be invalid for the purposes of federal sentencing proceedings, a denial of full faith and credit is not implicated because the effect of the federal court's action is limited to that proceeding only. In *United States v. Jones,* 907 F.2d at 479, 483, Judge Wilkinson cogently stated in dissent:

> Federal court invalidation of a state conviction — even if it lacks collateral legal consequences within the state — constitutes a major affront to the integrity of the state's judicial process.
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> * * *
>
> State convictions are either valid or they are invalid. They are not valid for some purposes, but invalid for others. They are not valid in the eyes of the state judiciary, but invalid in the eyes of the federal system.

The Fourth Circuit's standard herein gives proper deference to the requirement of full faith and credit by requiring invalidation of a predicate state conviction only when necessary to protect the reliability of the federal sentencing process. Since challenges to predicate state convictions which do not allege presumptively prejudicial constitutional errors do not, on their face, implicate

that reliability, no full hearing on all such claims is constitutionally required.

III. LIMITING CONSTITUTIONAL CHALLENGES TO PREDICATE STATE CONVICTIONS IN FEDERAL SENTENCING PROCEEDINGS TO CASES IN WHICH "PREJUDICE" MAY BE PRESUMED FROM THE ALLEGED CONSTITUTIONAL VIOLATIONS PROPERLY MINIMIZES INCREASED BURDENS ON THE STATE THAT OTHERWISE WOULD EXIST TO SUPPORT THE VALIDITY OF ITS CONVICTIONS.

In the case below, the United States Court of Appeals for the Fourth Circuit joined other circuits in assuming that the States have no interest regarding the issue of review of predicate state convictions during federal sentencing proceedings. *See, e.g., United States v. Paleo,* 967 F.2d 7, 12 (1st Cir. 1992); *United States v. Jones,* 907 F.2d at 468-69. Nonetheless, such courts have, in part, justified limitations on the review of state convictions because of the obvious time and resource burdens thereby imposed on federal prosecutors. Contrary to the views expressed by these courts, amici States do have an integral interest in upholding the validity of their state convictions. And to the extent the defense of this integral interest is made to burden the States, as a practical matter, with additional demands on their sovereign resources, it magnifies the ultimate cost to our judicial system from authorizing such challenges.

The decisions cited above imply that state prosecutors will not assist federal prosecutors in defending state convictions against collateral attack, simply because the state convictions are not directly at issue in federal sentencing proceedings. *United States v. Paleo,* 967 F.2d at 12. Even were that otherwise true, the federal prosecutors inevitably will turn to the state prosecutors for assistance in locating transcripts, witnesses, and other evidence, as well as for background information and advice about the legal arguments raised. More to the point, however, as a simple matter of comity, most state prosecutors will cooperate with and even directly assist their federal counterparts.

Of necessity, this activity will impose new demands upon the limited time and resources available to state prosecutors. Challenges to prior state convictions in federal sentencing hearings almost invariably will occur long after the state trial, conviction, and even appeal have taken place. Thus, they are remote in time. Review, therefore, is severely hampered by the "erosion of memory" and "dispersion of witnesses" that occur when such a length of time has passed. *Kuhlmann v. Wilson,* 477 U.S. 436, 453 (1986). Indeed, if there is to be no exhaustion requirement in such reviews, comparable to those fastidiously observed in federal habeas corpus proceedings, then review of an old conviction may become nearly impossible, due to the absence of "a complete factual record to aid the federal courts in their review." *Rose v. Lundy,* 455 U.S. 509, 519 (1982).

Inevitably, as in habeas corpus proceedings, the federal court must seek documentation or other evidence to support a state conviction that has been called into question in a federal sentencing hearing. The burden of providing this documentation can be increased immeasurably if the prior conviction was never reviewed in the state courts on direct appeal or in state post-conviction relief, because the necessary records may not exist at all in such a case. The sentencing hearing would thus require the state prosecutor, if possible, to duplicate or even recreate a case once thought to be closed.

Moreover, it is not true that a state will not be adversely affected by a decision in a federal sentencing proceeding that a state conviction is invalid. While there may be no direct release from prison as in a habeas corpus action, a decision holding a state conviction invalid could and surely would be utilized by an inmate or former inmate as a predicate for a new habeas corpus challenge, a challenge to a parole revocation based on the conviction, a civil rights action, a request for expungement, or, in states like Ohio with such a statute, a request for money damages for "wrongful imprisonment." *See* Ohio Revised Code §2743.48. Not only will state attorneys be required to handle these cases, and state courts to try them, but a successful suit would result in monetary damages payable by the State, all traceable to the initial collateral attack in the federal sentencing proceeding.

The Court is aware that some portion of inmate litigation can be routinely labelled as "frivolous." Former state defendants may utilize a favorable decision in federal sentencing in ways that cannot even be foreseen, despite limited chances of success. Even if these attempts would fail, they will predictably result in additional time and money being spent by the State in order to have them dismissed.

Finally, it is simply not true that the State has no interest in the integrity of its convictions, even if there would be no immediate practical ramifications for the State in a particular instance. As this Court has noted, a state trial is to be respected and treated as the "'main event' and not a 'tryout on the road' for what will later be the determinative federal . . .hearing." *Wainwright v. Sykes,* 433 U.S. 72, 90 (1977); *Engle v. Isaac, supra.* Aside from general interests of finality and of full faith and credit, a state prosecutor, who has marshalled and expended considerable time and resources, cannot be expected lightly to stand by to see that conviction held for naught. Allowing such challenges would impose significant practical costs on the States, and would present yet another unwelcome and unnecessary diversion from the state trial as the "main event" in the criminal justice process.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Brief of Respondent, this Court should affirm the decision of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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